Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Otis Henry,

Petitioner

v.

The City of Sherman,

Respondent.

Petition for a Writ of Certiorari from the Supreme Court of the State of Texas

---

PETITION FOR A WRIT OF CERTIORARI

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10 6 PP

QUESTION PRESENTED

Does the right of personal privacy, or a guarantee of certain areas or zones of privacy, existing under the United States Constitution, extend to legal, consensual, heterosexual, privately-consummated sexual conduct between a couple not married to one another?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Citations iii

Appendix iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

A. Facts Material to Question Presented 2

B. Federal Question Raised and Ruled Upon by Courts Below 3

1. City of Sherman, Texas, Civil Service Commission 3

2. 336th (Texas) Judicial District Court 3

3. Court of Appeals, Fifth District of Texas at Dallas 5

4. The Texas Supreme Court 6

Reasons for Granting the Writ 7

1. In Texas, the "Ceiling" has Fallen Through the "Floor" 7

2. The Texas Supreme Court's Decision is Standardless 13

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 11

City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996) 7,12

City of Sherman v. Henry, 910 S.W.2d 542 (Tex. App.-Dallas, 1995) 6,10

Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992) 9

Eisenstadt v. Baird, 405 U.S. 438 (1972) 5,6,13

Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988) 5,6

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986) 8

Roe v. Wade, 410 U.S. 113 (1973) 1,4,5

Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S.W.2d 203 (Tex. 1987) 4,8

Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 1979 (1984) 5,6

United States v. Schwinner, 279 U.S. 644 (1929) 9

Statutes Cited:

28 U.S.C. § 1257(a) 1

United States Constitution Cited:

United States Constitution 1,2,3 4,6,7 8,11,13,14

APPENDIX

Appendix A--Opinion of the Supreme Court of Texas dated July 8, 1996 1
Concurring Opinion of Justice Spector dated July 8, 1996 27
Concurring Opinion of Justice Owen dated July 8, 1996 33
Judgment of Supreme Court of Texas dated July 8, 1996 40

Letter Reflecting Denial of Rehearing Without Written Order dated September 19, 1996 . . 42

Appendix B--Opinion of the Court of Appeals, Fifth District of Texas at Dallas, dated August 28, 1995 43

Judgment of the Court of Appeals, Fifth District of Texas at Dallas, dated August 28, 1995 74

Appendix C--Judgment (including Memorandum Opinion) of the 336th Judicial District Court of Grayson County, Texas, dated December 2, 1993 75

Otis Henry respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas, reversing judgments in Petitioner Henry's favor emanating from the 336th Judicial District Court of Grayson County, Texas, and the Court of Appeals, Fifth District of Texas at Dallas, is reported at 928 S.W.2d 464, and is reproduced herein at Appendix A.

The opinion of the Court of Appeals, Fifth District of Texas at Dallas, is reported at 910 S.W.2d 542, and is reproduced herein at Appendix B.

The judgment (including memorandum opinion) of the 336th Judicial District Court of Grayson County, Texas, is unreported, but is reproduced herein at Appendix C.

STATEMENT OF JURISDICTION

The Supreme Court of Texas entered its judgment on July 8, 1996, and denied Petitioner's petition for rehearing September 19, 1996. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The right of privacy found in the "penumbra of the Bill of Rights," which, while not explicitly listed, is described by this Honorable Court, in *Roe v. Wade*, 410 U.S. 113, 152 (1973) as follows:

> The Constitution does not mention any right of privacy. In a line of decisions, however, ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution ...

STATEMENT OF THE CASE

A. Facts Material to Question Presented

In April, 1991, Petitioner--City of Sherman, Texas, police officer Otis Henry--entered into an intimate relationship with Ms. Kelly Olson, a civilian employee of the police department. Petitioner, a single man, believed Ms. Olson to be single also, based on misrepresentations made by Ms. Olson and her "secret spouse," Sherman Police Sergeant Tom Pollard. Ms. Olson and Sergeant Pollard, some time later, filed a statement with the city acknowledging that they were, in fact, married. Petitioner withdrew from his relationship with Ms. Olson/Pollard.

In early 1992, Petitioner ranked first on a city civil service list of officers eligible for promotion to sergeant. Sergeant Pollard then complained that Petitioner had committed adultery with Ms. Olson.

While acknowledging that the affair occurred privately, during off-duty hours, and acknowledging a total dearth of written regulations or guidelines governing private relationships, the police chief denied Petitioner his promotion, citing the affair as the sole reason for the passover.

The city's Civil Service Commission upheld the passover. On appeal, the State District Court reversed and ordered Petitioner's promotion. The State Court of Appeals upheld the State District Court. The Supreme Court of Texas reversed the courts below, holding that private consensual sexual conduct was not protected by the right of privacy under the Federal or Texas Constitutions.

B. Federal Question Raised and Ruled Upon By Courts Below

1. City of Sherman, Texas, Civil Service Commission

At the April 17, 1992, Civil Service Commission hearing, Petitioner summed up that Petitioner's passover by the chief of police amounted to a violation involving "the Constitution and Bill of Rights having to do with personal privacy." (Appellate Transcript, 178-79.)

The Commission, stating that the police chief "had a valid reason for not promoting ... Henry," entered its Order upholding the passover on April 20, 1992. (Appellate Transcript, 232.)

2. 336th (Texas) Judicial District Court

Petitioner, in his Plaintiff's First Amended Original Petition, asserted that the police chief's passover of Petitioner's promotion based on Petitioner's private, personal relationship, particularly in the absence of written rules or guidelines:

> ... is arbitrary, capricious, an *unwarranted invasion of the personal privacy* of Plaintiff ... and is violative of the *Constitutions* of the State of Texas and the *United States of America*.

(Appellate Transcript, 272--emphasis added.)

The 336th District Court, in his "Final Judgment," appended an unpublished memorandum opinion, holding:

> ... The protection of the individual's right to privacy is inherent in the United States Constitution, and it is no longer subject to question that an individual's private sexual activities are within the "zone of privacy" which is protected from government intrusion. *Roe v. Wade*, 410 U.S. 113 (1973). The appellate courts of Texas have recognized and broadened this protected right of privacy. *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746 S.W.2d 203 (Tex. 1987).

(Appellate Transcript, 392; Appendix C, *infra*.)

3. Court of Appeals, Fifth District of Texas at Dallas

At pages 20-30, Petitioner's Appellee's Brief (Petitioner Henry prevailed in state district court, and the City of Sherman appealed) Henry discussed "Federal Constitutional Protection of Privacy Rights ('The Floor')." Henry asserted:

> Inquiry into sexual activities violates the Constitutionally protected right of privacy; a party's private sexual activities are within the "zone of privacy" which is protected from government intrusion. See: *Roe v. Wade*, 410 U.S. 113 (1973)...

(Appellee's Brief, 20-21.) In addition to *Roe v. Wade*, Henry cited, *inter alia*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 1979 (1984).

The Dallas Court of Appeals, affirming the state district court's judgment in Henry's favor, held that Henry's conduct was protected by the Texas Constitution, holding:

> ... While federal case law does not control our interpretation of our own constitution, we find two cases from the Ninth Circuit persuasive. See *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), *cert.*

> *denied*, 485 U.S. 961 (1988); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 1979 (1984). Both cases address the extent of the federal right of privacy in situations involving facts similar to those presented in this case.
>
> ...
>
> The (Fleisher) Court then focused its attention on the line of Supreme Court cases based on individual autonomy where the right of privacy has been extended to unmarried individuals. *Fleisher*, 829 F.2d at 1497 [citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)].

City of Sherman v. Henry, 910 S.W.2d 542, 552-53 (Tex. App.-Dallas, 1995). The court utilized the federal authorities above cited to determine that "the Texas Constitution protects the complained of conduct," rendering it unnecessary to analyze the protection provided by the United States Constitution. *Id.* 910 S.W.2d at 556. (Appendix B, *infra*.)

4. **The Texas Supreme Court**

The City of Sherman next filed its application for writ of error to the Texas Supreme Court. Henry adopted, in toto, his Appellee's Brief already filed in the Dallas Court of Appeals. Consequently, the Supreme Court of Texas was presented with Henry's "Federal Constitutional Protection

of Privacy Rights ('The Floor')" section, at pages 20-30 of his said brief, described in more detail *supra*.

The Supreme Court of Texas held that Henry's complained-of conduct was protected by neither the State Constitution (the so-called "ceiling") nor by the United States Constitution (the so-called "floor"). In doing so, the Supreme Court of Texas held that the United States Constitution confers a "limited right of privacy for individuals to make certain fundamental decisions or engage in certain conduct." However, the Texas Court held that such "limited right" does not extend to private, consensual, heterosexual relations between consenting adults, when one of the two adults is married. *City of Sherman v. Henry*, 928 S.W.2d 464, 469 (Tex. 1996). (Appendix A, *infra*.)

REASONS FOR GRANTING THE WRIT

1. In Texas, the "Ceiling" has Fallen Through the "Floor"

More than a decade ago (and not without a touch of pomposity) the Supreme Court of Texas declared itself the true guardian of the rights of the United States Citizens who happened to reside in Texas.

> The *federal constitution* sets the *floor* for individual rights; *state constitutions* establish the *ceiling*. Recently, state courts have not hesitated to look to their own constitutions to protect individual rights ... *This court has been in the mainstream of this movement* ...

> Texans have adopted state constitutions to restrict governmental power and guarantee individual rights ... By enforcing *our constitution*, we provide Texans with their *full individual rights* and *strengthen* federalism.

LeCroy v. Hanlon, 713 S.W.2d 335, 338-39 (Tex. 1986) (emphasis added).

The following year (more pronouncedly pompous) the Supreme Court of Texas noted that if the Federal Constitution implicitly protected privacy, the Texas Constitution did likewise, but even stronger.

> We decide this case pursuant to the Texas Constitution. While the Texas Constitution contains no express guarantee of a right to privacy, it contains several provisions similar to those in the United States Constitution that have been recognized as implicitly creating protected "zones of privacy." Cf. *Roe v. Wade*, 410 U.S. 113, 152 (1972) ....

Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987).

Indeed, as recently as 1992, the Supreme Court of Texas recognized that the citizens of Texas deserved protection from the so-called "scepter of power" of an overzealous, authoritarian minority of the Texas judiciary, and declared court-imposed gag orders "presumptively unconstitutional," viewing the federal standard as "too permissive" toward prior restraints. *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992). Preaching tolerance, the court noted:

> In the words of Justice Holmes, genuine freedom of expression requires "not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwinner*, 279 U.S. 644 (1929) (Holmes, J., dissenting).

Id., 859 S.W.2d at 8.

The Texas Supreme Court's penchant for zealously guarding the freedom of individual United States citizens (who are blessed and privileged to also be Texans) must, however, take a back seat to political practicality. If the actions to be protected would expose the Texas Supreme Court to the hatred of the (voting) majority, it is time to abandon ceilings, floors, high-sounding principles, and such, in favor of "the three 'Ps.'" ("Preserve your political posterior.")

A courageous state district judge, after agonizing with the issue for over a year, recognized that Officer Henry could not have been deprived of professional advancement but for constitutionally impermissible invasion of his

personal privacy by his governmental employer. Risking the wrath of his local constituency, a courageous Judge Ray F. Grisham wrote:

> ... I must confess that Plaintiff's actions in committing adultery with a fellow officer's wife is repugnant to my own sense of morality and order ... However, in deciding this case, I am constrained to set aside personal opinions and preferences and instead look to the constitutions and laws of our state and nation. History teaches us that the only thing standing between the rights of the private citizen and the all-powerful government is the court system. In that capacity, my oath of office dictates that this court must stand tall.

Trial Court's unpublished "Final Judgment." (Appendix C, *infra*.)

An equally courageous intermediate appellate court, risking the ire of its area constituency noted that: (1) in Texas, adultery and fornication were de-criminalized by the Texas Legislature more than two decades ago; (2) that the *legal* sexual activity was conducted in private; (3) that there was no direct evidence that the alleged affair affected departmental order and discipline; and (4) "*glaringly absent in this case are any written regulations or guidelines prohibiting the complained of conduct.*" *City of Sherman v. Henry*, 910

S.W.2d 542, 553-54 (Tex. App.--Dallas 1995) *rev'd* 928 S.W.2d 464 (Tex. 1996) (emphasis added). A courageous and learned Chief Justice Linda Thomas, writing for a unanimous court, observed:

> If the city chooses to regulate its employees' sexual morality, it must at least do so through regulations carefully tailored to meet the City's specified needs. Without narrowly tailored regulations, the risk is too great that an infringement of this important constitutionally protected right might be justified on the basis of individual prejudice and bias toward the protected conduct. *It is important to note that private prejudice is never a cognizable government interest. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

Id., 910 S.W.2d at 555 (emphasis added).

When the Texas Supreme Court went into the business, more than a decade ago, of protecting individual rights above and beyond the parameters set by the United States Constitution and this Honorable Tribunal, its members should have anticipated that it would be called upon, from time to time, to make decisions which, while constitutionally correct, would inevitably invoke the wrath and even hatred of the often-vocal, always-moral majority.

Failing to do so, the Texas Supreme Court found itself in the position of "standing tall" for the Constitution, or catering to that majority--in an election year at that.

Suddenly, the ceiling disappeared.

> ... Today, the majority announces that the Texas constitutional right of privacy has somehow shriveled to the point that the most personal aspects of our lives are the Government's business.

City of Sherman v. Henry, 928 S.W.2d at 474 (Spector, J., concurring).

> ... The opinion may be read to decide issues not before us, issues that we have not carefully considered in light of our own decisions and decisions of the United States Supreme Court ... What if Henry were not a man, but an unmarried woman who gave birth to the child of a married man who had no connection with the police department? Would we say that the City could discharge her or deny her a promotion because of her adulterous conduct? Would such actions raise a constitutional question about

> the right to bear or beget a child which the United States Supreme Court has said is a fundamental "right of the *individual*, married or single" that must be free from unwarranted governmental intrusion? *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

Id., 928 S.W.2d at 478 (Owen, J., concurring).

Not only has the "ceiling" disappeared, but the "floor," as set by the United States Constitution and this Honorable Forum, has been ignored by the Supreme Court of Texas. As noted by the two female members on the Texas Supreme Court in their "dissenting concurrences," suddenly Texans' remaining rights to constitutionally protected privacy (if any) are standardless. The "ceiling" has collapsed and fallen through the "floor"--unless, of course, the "floor" is shored up by this Honorable Court.

2. The Texas Supreme Court's Decision is Standardless

A public employee who, during his private off-duty hours carried on a romance with a woman he had been duped into believing to be single committed "unintentional adultery." However, in Texas, both adultery and fornication had been "de-criminalized" for more than two decades. His fornication/adultery was enjoyed in the privacy of his home; with a consenting, heterosexual partner; during off-duty hours. Not only was he not in violation of law--he was not violating any departmental rules or regulations regarding

private, off-duty, personal, consensual, sexual conduct of police personnel.

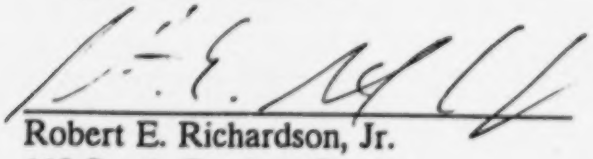
What Petitioner Henry violated was the highly subjective, unwritten sense of morality of the chief of police. The decision of the Texas Supreme Court, if allowed to stand, constitutes an open invitation to every police chief--indeed, every governmental supervisor--in Texas to pry into the personal lives of subordinates, and to discharge or deny promotion to such subordinates as fail to measure up to the chief's unwritten, self-imposed, standardless code of morals or ethics. If allowed to stand, the Texas Supreme Court's decision will, indeed, predictably result in empowering police chiefs and other governmental supervisors to impose personal prejudices upon their subordinates.

CONCLUSION

This case affords an ideal vehicle by which this Honorable Court may once again confirm the existence of the right of personal privacy, or a guarantee of certain areas or zones of privacy, under the United States Constitution--a right requiring no enhancement by the constitutions or supreme courts of Texas or any other state. Moreover, this case presents a unique opportunity for this Honorable Court to issue guidance with regard to standards to be utilized by those individuals or entities who would exercise some legitimate purpose in imposing reasonable restraints and exceptions to the right to privacy of Petitioner Henry and similarly situated citizens of these United States.

These reasons justify a writ of certiorari to review the judgment of the Supreme Court of Texas.

Respectfully submitted,



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APPENDIX A--OPINION OF SUPREME COURT OF TEXAS, DATED JULY 8, 1996

IN THE SUPREME COURT OF TEXAS

No. 95-1195

CITY OF SHERMAN, PETITIONER

v.

OTIS HENRY, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued February 14, 1996

JUSTICE ABBOTT delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE CORNYN, JUSTICE ENOCH and JUSTICE BAKER join.

JUSTICE SPECTOR filed a concurring opinion.

JUSTICE OWEN filed a concurring opinion.

The City of Sherman Police Chief denied Patrolman Otis Henry a promotion to the rank of sergeant because Henry was having a sexual affair with the wife of a fellow police officer. The Firemen's and Police Officers' Civil Service Commission of the City of Sherman, Texas (the Commission) upheld that decision by finding that the Police Chief had a valid reason for not promoting Henry. Henry appealed to district court which held that the basis of the Police Chief's decision violated Henry's right to privacy under the United States and Texas Constitutions and was not a valid reason for denying the promotion. Accordingly, the district court ordered the promotion of Henry. That decision was affirmed by the court of appeals. 910 S.W.2d 542. We reverse the judgment of the court of appeals and hold that Henry's constitutional rights were not violated when he was denied a promotion for having a sexual affair with another officer's wife.

I

Sergeant Tom Pollard and Dispatcher Kelly Olson worked for the Sherman Police Department. Pollard and Olson were married in September 1989, but kept their marriage secret for nearly two years because they believed the police department had a nepotism policy prohibiting marriage between employees.

Henry and Olson developed a relationship in April 1991 that progressed into a sexual affair. When the relationship began, Henry knew that Olson and Pollard lived together and were dating, but he did not know they were married. In June 1991, Olson admitted to Henry that she was married to Pollard. A month later, Olson and Pollard informed the department they were married. Olson and Pollard separated in December 1991 and Pollard filed for

divorce. Meanwhile, the sexual affair between Henry and Olson continued.

Police Chief Stephen Pilant first heard allegations of the affair in the late summer or early fall of 1991. After that, Chief Pilant noticed that Pollard seemed distraught on occasion and missed work due to illness. Rumor and innuendo about the affair increased in December 1991, about the same time it became known in the department that a sergeant's position would become available in January 1992.

Henry ranked first on the city's civil service list of eligible candidates for promotion to the sergeant's position. Additionally, Henry had completed all Texas Commission on Law Enforcement certification procedures, earned a bachelor's degree in criminal justice, received numerous commendations, and was honored as "Outstanding Officer of the Year" in 1991. Absent a valid reason to the contrary, Henry was entitled to the promotion to sergeant. *See* TEX. LOC. GOV'T CODE § 143.036(f).

In mid-January, and before making the promotion decision, Chief Pilant asked Lieutenant Mayo to investigate the validity of the rumors regarding Henry's relationship with Olson. The investigation consisted of Lieutenant Mayo getting from Pollard a memorandum detailing facts about the affair and a love letter from Henry to Olson. Pollard's memorandum simply described how he had already verified the existence of the affair. The record reveals that several months *before* Chief Pilant requested an informal investigation, Pollard had already confirmed the affair between Olson and Henry. Moreover, Pollard did not engage in clandestine conduct to "investigate" the affair; instead, he discovered Olson and Henry together while he

was driving on the public streets. He also found in his own home love letters from Henry to Olson. Mayo did not pursue further investigation after receiving Pollard's memorandum, and he did not interrogate Henry or anyone else about the matter.

On January 17, 1992, a sign appeared on a department bulletin board and in the departmental mailboxes of most police officers that stated in its entirety: "If you can't trust another officer with your wife, how can you trust him with your life?" Henry assumed the author directed the jab at him and complained about the sign to Lieutenant Mayo and another Lieutenant. Henry also requested an investigation by the Internal Affairs Division.

One month later, Chief Pilant announced that Henry would be passed over for the promotion. In a written memorandum, Chief Pilant stated the reason for denying the promotion was his belief that Henry would not command respect and trust from rank-and-file officers and that promoting Henry would adversely affect the efficiency and morale of the department. Chief Pilant orally expressed to Henry that the sole basis of these conclusions was the affair Henry had with Olson.

Henry appealed Chief Pilant's decision to the Commission. At the hearing, Chief Pilant admitted that Henry was very qualified for the sergeant's position. Nevertheless, Pilant testified that he did not promote Henry because of the impact the relationship between Henry and Olson would have both on Henry's ability to perform his work and on the morale of the department. As evidence that the affair was disruptive, the Chief pointed to the rumors and innuendo among officers, the sign posted on the bulletin board, and the emotional distress suffered by

Pollard. The Chief acknowledged that he had never before passed over a candidate for promotion and that there was no written rule in the department's manual or in state law authorizing him to deny Henry's promotion due to the affair. He also conceded that there was never any indication that Henry and Olson engaged in sex while on duty. Nonetheless, the Chief stated he had an unwritten policy that he would not promote anyone having an affair with the spouse of a fellow officer.

In explaining why the affair established a valid reason for not promoting Henry, Pilant stated:

> A police officer, by the very nature of his work, often times must put his complete faith and trust in fellow officers, to some point even as much as trust him with his life. If a police officer, in my opinion, cannot be trusted to take care of and protect a fellow officer's family . . ., you would have serious doubts about whether that police officer can be trusted with your own life. It also hinders the harmony of police officers between each other.

Several more witnesses testified at the Commission hearing that the affair adversely affected the department and that Henry's promotion would have a detrimental impact on morale and on Henry's ability to perform his job. That evidence was contested by testimony from Henry and Olson.

After hearing all of the evidence presented by the City and by Henry, the Civil Service Commission voted unanimously that Chief Pilant had a valid reason for not promoting Henry. Henry appealed the Commission's decision to state district court where both Henry and the City of Sherman moved for summary judgment. Significantly, neither party challenged the Commission's fact findings or claimed the Commission's decision was not based on substantial evidence. Indeed, both parties submitted their summary judgment motions to the district court upon stipulated facts. One of the stipulated facts was that Henry was denied the promotion because he had a sexual affair with Olson.

Based upon the stipulated facts, both parties requested the district court to decide whether the evidence considered by the Commission demonstrated a valid reason for denying Henry's promotion. Henry argued the reason was invalid because his conduct was protected by the United States and Texas Constitutions. The City argued that the stipulated reason for not promoting Henry was constitutionally valid. The district court agreed with Henry, granted his motion for summary judgment, ordered his promotion with back pay, and granted him attorney's fees in the amount of $36,343.75. The court of appeals affirmed the district court, holding that Henry's constitutional rights were violated when he was denied a promotion because of his sexual affair with Olson.

During the oral argument of this case, the parties represented that, after the trial court's judgment, Henry was promoted to sergeant and the Pollards subsequently remarried. Thus, the issue for us to decide is whether Henry is entitled to the back pay and the attorney's fees awarded to him by the trial court. To make that determination, we

must decide whether the Police Chief's reason for denying Henry the promotion infringed upon Henry's constitutional rights. Because both parties have a financial interest in the outcome of the case, a contested case and controversy has been presented which must be decided by the Court. *Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988); *cf. Speer v. Presbyterian Children's Home*, 847 S.W.2d 227, 229 (Tex. 1993). Neither Henry nor the City of Sherman claim the case is moot, and both parties have squarely presented the constitutional issue to this Court for resolution.

II

Chief Pilant could properly deny the promotion to Henry for a "valid reason." Section 143.036(f) of the Texas Local Government Code provides:

> Unless the department head has a *valid reason* for not appointing the person, the department head shall appoint the eligible promotional candidate having the highest grade on the eligibility list .... on application of the bypassed eligible promotional candidate, the reason the department head did not appoint that person is subject to review by the commission.

TEX. LOC. GOV'T CODE § 143.036(f)(emphasis added). The Commission upheld Chief Pilant's reason for not promoting Henry even though Henry had the highest grade

on the eligibility list at the time the promotion was available.

An appeal of the Commission decision to district court is authorized by Section 143.015 of the Local Government Code.[1] Ordinarily, judicial review of the Commission's decision requires application of the substantial evidence test. *See Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116-17 (Tex. 1988), *cert. denied*, 490 U.S. 1080 (1989); *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984).

In this case, however, traditional substantial evidence analysis is not required because neither party challenges the Commission's fact findings or claims the Commission's decision was not based on substantial evidence. As a result, substantial evidence to support the Commission's ruling is presumed. The focus of Henry's appeal to the district court, the focus of the court of appeals, and thus our concern, is whether the reason for not promoting Henry--having a sexual affair with the wife of another officer--is constitutionally valid. Accordingly, if the reason for denying Henry's promotion is constitutional, the substantial evidence

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[1] Section 143.015 states:

> (a) If a fire fighter or police officer is dissatisfied with any commission decision, the fire fighter or police officer may file a petition in district court asking that the decision be set aside.

TEX. LOC. GOV'T CODE § 143.015.

test is satisfied, the promotion is properly denied, and the judgment of the court of appeals is reversed.

III

Henry maintains his conduct is protected by the right to privacy under both the United States and Texas Constitutions. Neither Constitution expressly provides a right of privacy. Indeed, neither Constitution even contains the word "privacy." However, the United States Supreme Court has recognized that at least two different kinds of privacy interests are protected by the United States Constitution.

The first type of privacy protects an individual's interest in avoiding the disclosure of personal information. *Whalen v. Roe*, 429 U.S. 589, 599 (1977). This interest is the "right to be let alone," which has been characterized as "the right most valued by civilized men." *Id.* at 599 & n.25 (quoting *Olmstead v. United States*, 277 U.S. 428, 478 (1928)(Brandeis, J., dissenting)). The second constitutionally protected privacy interest is the right to make certain kinds of important decisions and to engage in certain kinds of conduct. *Whalen*, 429 U.S. at 600. This interest protects individual autonomy in making decisions and conduct relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 600 & n.26.

The first privacy interest focuses on government action that is intrusive or invasive; the second concerns decisions or conduct by individuals. The United States Supreme Court and lower federal courts have consistently recognized the dichotomy between these two distinct aspects of the privacy right. *See, e.g, United States v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Belutti v. Baird*, 443 U.S. 622, 655 (1979)(Stevens, J., concurring); *Woodland v.*

City of Houston, 940 F.2d 134, 138 (5th Cir. 1991); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1497 n.5 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984); *Schachter v. Whalen*, 581 F.2d 35, 37 (2d Cir. 1978).

In *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987)(hereinafter *TSEU*), this Court noted that the Texas Constitution contains "several provisions similar to those in the United States Constitution that have been recognized as implicitly creating protected 'zones of privacy.'" *Id.* at 205. We also noted that "a right of individual privacy is implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights." *Id.* (quoting TEX. CONST. art. I, Introduction to the Bill of Rights).

In *TSEU*, the Texas Department of Mental Health and Mental Retardation had instituted a mandatory polygraph policy requiring employees to submit to a polygraph during the course of an investigation of suspected patient abuse, theft, or other criminal behavior. *Id.* at 204. The case did not concern the constitutionality of individual conduct; instead it focused on the constitutionality of the governmental intrusion. Obviously, patient abuse or criminal behavior is not constitutionally protected by the autonomy aspect of privacy. The government could typically regulate such conduct or make an employment decision based on such conduct. But the government nevertheless does not have license to intrusively pry into the affairs of its employees. Thus, we held in *TSEU* that the Texas Constitution protected the personal privacy of the employees from the unreasonable intrusion of the

mandatory polygraph policy. *Id.* at 205-06. The meaning of *TSEU* was not that the employees' conduct was constitutionally protected; but rather that the government impermissibly intruded on the employees' "right to be let alone."

Henry's claim presents the opposite scenario. Henry does not claim that Chief Pilant or the City of Sherman invaded his right to be let alone. Similarly, he does not complain that the government's method of obtaining information regarding his affair with Olson constituted any type of intrusion into his personal life. Instead, Henry urges that the *basis* of Chief Pilant's decision (Henry's adulterous affair with another officer's wife) was invalid because it violated his constitutionally protected privacy rights. This is a claim only under the autonomy aspect of the right to privacy--the right to make certain fundamental decisions and engage in certain conduct without state interference. Thus, the sole issue for our review is whether conduct involving an affair by one police officer with the wife of another officer is a fundamental, constitutionally protected right.[2] We will

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[2] Both of the concurrences object to the manner in which the controlling issue in this case has been framed. *Infra*, _ S.W.2d at _ & _. Despite their protestations, however, the primary issue framed by Henry, the City, and the court of appeals was whether Henry's sexual conduct with the wife of another officer was a constitutionally impermissible basis to pass him over for promotion. 910 S.W.2d at 549-50. The actual language used by Henry is: "The court below did not err in rendering judgment requiring Appellant City to promote Appellee Henry, because the sole reason relied upon by the City for denial of Appellee's promotion was constitutionally infirm, and

not address or express any opinion on whether Henry could have maintained an action against the City of Sherman for unreasonably investigating his private affairs since that argument is not in issue.

A

The United States Supreme Court has construed the United States Constitution to confer a limited right of

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cannot, therefore, constitute a 'valid reason' as mandated by TEX. LOC. GOV'T CODE ANN. § 143.036(f)." Later in his briefing, Henry claims that "there can be no question that the sole and only reason that Sherman Police Patrolman Otis Henry was denied his rightful promotion was his private affair with Kelly Olson/Pollard."

> Justice Spector's concurrence claims that this case does not involve whether a right to privacy protected Henry's conduct, but rather whether "our constitution protects the relationship from intrusion by the government in the absence of a compelling state interest." _ S.W.2d at _. That issue heretofore has been a stranger to this litigation. Neither Henry nor the City briefed or analyzed the constitutional issue involving intrusion.
>
> Justice Owen's concurrence argues that we should *assume* that Henry had a constitutional right and then determine that any intrusion on this right was justified. *Id.* at _. The problem with this approach is that it assumes the only issue the parties ask us to decide. We will not side-step that issue.

privacy for individuals to make certain fundamental decisions or engage in certain conduct. *Whalen*, 429 U.S. at 600. In *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), the Supreme Court thoroughly analyzed this right to privacy and concluded that its scope has been limited to child rearing and education, *see Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923); family relationships, *see Prince v. Massachusetts*, 321 U.S. 158 (1944); procreation, *see Skinner v. Oklahoma*, 316 U.S. 535 (1942); marriage, *see Loving v. Virginia*, 388 U.S. 1 (1967); contraception, *see Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965); and abortion, *see Roe v. Wade*, 410 U.S. 113 (1973).

Bowers concemed a challenge to Georgia's sodomy statute brought by a homosexual adult male who had been charged with (but not indicted for) violating the sodomy law. The Court ruled there was no fundamental right to engage in homosexual sodomy. 478 U.S. at 191. In so doing, it emphasized that its prior decisions do not "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated." *Id*. The Court reasoned that there was no resemblance or connection between the claimed constitutional right to engage in homosexual sodomy and the recognized privacy rights concerning marriage, procreation, and family. *Id*. at 190-91.

The *Bowers* Court also analyzed whether it should recognize a substantive due process right for homosexual activity under the Fourteenth Amendment. It held that only those rights which are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist" if they were sacrificed, or those liberties which are "deeply rooted in this Nation's history and tradition" receive constitutional protection under the substantive component

of the due process clause. *Id.* at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) and *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). The Court held that neither of these formulations applied to create a fundamental right for homosexuals to engage in acts of consensual sodomy. *Id.* at 192.

In reviewing the history of sodomy, the Court noted it was a criminal offense at common law, forbidden by all the original thirteen states when they ratified the Bill of Rights, and the vast majority of the states when the Fourteenth Amendment became the law of the land. *Id.* at 192-93. The Court concluded that, based on this history, the claim that the right to engage in homosexual sodomy was "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition" was, at best, facetious. *Id.* at 194.

Using the Supreme Court's framework, we conclude that Henry's affair with Pollard's wife is unlike the recognized privacy rights concerning child-rearing, family relationships, procreation, marriage, contraception, and abortion. Indeed, Henry's adulterous conduct is the very antithesis of marriage and family. Adultery, by its very nature, undermines the marital relationship and often rips apart families. Rather than suffering an invasion of privacy, Henry invaded the "privacy surrounding the marriage relationship" so revered by Justice Douglas in *Griswold*. 381 U.S. at 486.

Moreover, sexual relations with the spouse of another is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Prohibitions against adultery have ancient roots. In the latter half of the 17th century in England, adultery

was a capital offense. 4 WILLIAM BLACKSTONE, COMMENTARIES *64. The common law brought to this country by the American colonists included the crime of adultery as previously defined by the canon law of England. *United States v. Clapox*, 35 F. 575, 578 (D. Or. 1888); FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW vol. 11, §§ 1719-20, p. 524 (9th ed. 1885). Adultery was still considered a crime by courts and commentators in the latter half of the 19th century when the Fourteenth Amendment was ratified. *See Clapox*, 35 F. at 578; WHARTON, *supra*. In fact, adultery is a crime today in half of the states and the District of Columbia.[3]

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[3] Twenty-five states and the District of Columbia still provide criminal penalties for adultery. ALA. CODE § 13A13-2 (1982); ARIZ. REV. STAT. ANN. §§ 13-1408-1409 (1989); COLO. REV. STAT. § 18-6-501 (1981); D.C. CODE § 22-301 (1981); FLA. STAT. § 789.01 (1976); GA. CODE ANN. § 16-6-19 (1988); IDAHO CODE § 18-6601 (1987); ILL. REV. STAT. § 720 5/11-7 (1990); KAN. STAT. ANN. § 21-3507 (1991); MD. ANN. CODE art. 27, § 4 (1987); MASS. ANN. LAWS ch.272, § 14 (1991); MICH. COMP. LAWS ANN. § 750.30 (1991); MINN. STAT. § 609.36 (1987); MISS. CODE ANN. § 97-29-1 (1973); NEB. REV. STAT § 28-704 (1989); N.H. REV. STAT. ANN. § 645:3 (1986); N.Y. PENAL LAW § 255.17 (1989); N.C. GEN. STAT. § 14-184 (1990); N.D. CENT. CODE § 12.1-20-09 (1991); OKLA. STAT. ANN. tit. 21, § 871 (1983); R.I. GEN. LAWS § 11-6-2 (1990); S.C. CODE ANN. §§ 16-15-60, 16-15-70 (1985); UTAH CODE ANN. § 76-7-103 (1990); VA. CODE ANN. § 18.2-365 (1988); W. VA. CODE § 61-8-3 (1989); WIS. STAT. ANN. § 944.19 (1982). Coincidentally, when the *Bowers* opinion was issued in 1986, twenty-five states and the District of Columbia had criminal

While other states, including Texas, have recently repealed laws criminalizing adultery, the mere fact that such conduct is no longer illegal in some states does not cloak it with constitutional protection. Even in most states where adultery is not criminal behavior, civil laws still burden those engaging in adulterous activity. *See* Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1672-74 (1991). A right to engage in adultery simply cannot be said to be either "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."

Our conclusion that adultery is not a fundamental right protected under the United States Constitution is buttressed by dicta contained in several Supreme Court opinions. Justice Goldberg's concurrence in *Griswold*, which was joined by Chief Justice Warren and Justice Brennan, stated that the constitutionality of statutes prohibiting adultery and fornication was "beyond doubt." 381 U.S. at 498 (Goldberg, J., concurring). Similarly, the Court in *Bowers* expressed concern that, if it granted a right of privacy to homosexual conduct, "adultery, incest, and other sexual crimes" would also be protected. 478 U.S. at 195-96. The Court opined that it was "unwilling to start down that road." *Id.* at 196. Even the dissenting justices in *Bowers* (Justices Blackmun, Brennan, Marshall, and Stevens) claimed that a court "could find simple, analytically sound

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penalties for sodomy. *See* 478 U.S. at 193-94. The *Bowers* holding that the right to engage in homosexual conduct was not constitutionally protected was based, in part, on the fact that half the states still criminalized the conduct. *See id.*

distinctions between certain private, consensual sexual conduct, on the one hand, and adultery . . . on the other." *Id.* at 209 n.4 (Blackmun, J., dissenting). One major distinction noted by the dissent was that adultery often injures third persons, such as spouses and children. *Id.* Thus, every justice in the *Bowers* case joined an opinion that either equated adultery with homosexual conduct or concluded that adultery was more egregious than homosexual conduct. Because homosexual conduct is not a fundamental right under the United States Constitution, adultery likewise cannot be a fundamental right.

Several federal courts of appeals have followed the *Bowers* decision to conclude that certain types of sexual conduct are not constitutionally protected. *E.g, Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994)(en banc); *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992); *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1074 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1498 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987).

Similarly, several federal district courts have concluded that adultery is not protected by the right to privacy. *E.g, Oliverson v. West Valley City*, 875 F. Supp. 1465, 1480 (D. Utah 1995)("Extramarital sexual relationships are not within the penumbra of the various constitutional provisions or the articulated privacy interests protected by the Constitution"); *Suddarth v. Slane*, 539 F. Supp. 612, 617 (W.D. Va. 1982)(holding that federal privacy rights do not include protection for adultery); *Johnson v. San Jacinto*

Junior College, 498 F. Supp. 555 (S.D. Tex. 1980)(stating that right to privacy does not protect adulterous conduct).

Despite this authority, Henry claims that two lower federal court cases establish that his conduct is protected by a constitutional right to privacy. In *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd mem.*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985), a Michigan federal district court held that Briggs' right of sexual privacy was infringed when Briggs, a married man, was fired from his police officer position for living with a married woman who was not his wife. In *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984), the appellate court ruled that Ms. Thorne's right to privacy had been infringed when she was denied employment as a police officer because, among other things, she stated in response to polygraph questions that she had become pregnant by an officer on the police force who was married to another woman.

We are unpersuaded by *Briggs* and *Thorne*. *Thorne* involved a polygraph and was based in part on an individual's interest in avoiding disclosure of personal matters, an interest not implicated in this case. Moreover, both *Thorne* and *Briggs* were issued prior to the Supreme Court's decision in *Bowers* and both decisions fail to provide the detailed analysis required by the Supreme Court to determine whether the conduct was "implicit in the concept of ordered liberty" or "deeply rooted in the traditions of our Nation." Instead, the courts summarily concluded that private sexual conduct was protected by the United States Constitution.

Indeed, the author of *Bowers*, Justice White, dissented from the decision to deny certiorari in the *Briggs*

case, stating: "This case presents an important issue of constitutional law regarding the contours of the right of privacy afforded individuals for sexual matters. It is an issue over which courts are divided, and I would grant certiorari to address it squarely." *Briggs*, 473 U.S. at 910. In *Bowers*, Justice White and the Supreme Court took the opportunity to clarify the contours of the right to privacy regarding sexual matters.

The other cases relied upon by Henry, *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984), and *Rutan v. Republican Party*, 497 U.S. 62 (1990), are freedom of association and freedom of political expression cases and are irrelevant to Henry's claim to a privacy right. We conclude that the right to privacy under the United States Constitution does not include the right to maintain a sexual relationship with the spouse of someone else. Such conduct is the antithesis of the constitutionally protected rights of marriage and family; a right to engage in that conduct can hardly be said to be "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." We turn now to Henry's claim to a privacy right under the Texas Constitution.

B

Although the Texas Constitution does not expressly provide a right of privacy, our opinion in *TSEU* recognized constitutionally protected zones of privacy emanating from several sections of article I of the Texas Constitution: section 6, concerning freedom of worship; section 8, concerning freedom of speech and press; section 9, concerning searches and seizures; section 10, concerning the rights of an accused in criminal prosecutions; section 19, concerning deprivation of life, liberty and property, and due

course of law; and section 25, concerning quartering soldiers in houses. *TSEU*, 746 S.W.2d at 205. No court has recognized any other provision of the Texas Constitution as establishing a right to privacy.[4] Other than section 19, none of these provisions even remotely addresses the situation of an individual who is denied a promotion because he is having an affair with the wife of someone else. We are thus faced with the task of deterinining whether Henry's conduct is protected by article I, section 19 of the Texas Constitution.

The method to interpret and apply the Texas Constitution has been defined as follows:

> In construing [a section of the Texas Constitution], we consider "the intent of the people who adopted it." In determining that intent, "the history of the times out of which it grew and to which it may be

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[4] 0ther than in *TSEU*, this Court has not examined the right of privacy under the Texas Constitution. However, the Third Court of Appeals relied on *TSEU* to analyze this state's right of privacy in *State v. Morales*, 826 S.W.2d 201, 204-05 (Tex. App.--Austin 1992)(holding that the state sodomy statute violated the Texas Constitution), *rev'd*, 869 S.W.2d 941 (Tex. 1994). Because we concluded that neither the district court nor the court of appeals in *Morales* possessed jurisdiction to issue a declaration regarding the constitutionality of the criminal sodomy statute, we reversed the judgment of the court of appeals and remanded the case to the trial court with instructions to dismiss for want of jurisdiction, without reviewing or expressing an opinion on the court of appeals' discussion regarding the scope of the right to privacy. *See* 869 S.W.2d at 942.

> rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of the inquiry." However, because of the difficulties inherent in determining the intent of voters over a century ago, we rely heavily on the literal text.

Edgewood v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989)(citations omitted); *see also Ex parte Tucci*, 859 S.W.2d 1, 18 (Tex. 1993)(Phillips, C.J., concurring) and *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992). Another articulation of this standard states that we:

> "look to such things as the language of the constitutional provision itself, its purpose, the historical context in which it was written, the intentions of the framers [and ratifiers], the application in prior judicial decisions, the relation of the provision to [other parts of the constitution and] the law as a whole, the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values including justice and social policy."

Ex parte Tucci, 859 S.W.2d 1, 18 n.3 (Tex. 1993)(Phillips, C.J., concurring)(unbracketed material quoting *Davenport v. Garcia*, 834 S.W.2d at 30 (Hecht, J., concurring)).

Applying this method of constitutional analysis, there is no reason to believe that article I, section 19 of the Texas Constitution provides a right of privacy for Henry's conduct. That constitutional provision states:

> No citizen of this State shall be deprived of life,

> liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

This language is remarkably similar to the Fourteenth Amendment to the United States Constitution[5] upon which the United States Supreme Court has relied when defining right to privacy parameters. While the Texas Constitution has been recognized to possess independent vitality, separate and apart from the guarantees provided by the United States Constitution, *see In the Interest of J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994) and *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986), there is no reason to expand Texas constitutional protections to protect Henry's conduct.

Neither Henry nor Justice Spector's concurring opinion provides any support for the proposition that the framers or ratifiers of the Texas Constitution would have considered the right to have a sexual affair with the wife of another an essential component of life, liberty, or property. Nor has there been any showing that Henry's conduct is among those "general, great, and essential principles" of our govemment. In fact, when our state charter was ratified in

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[5] The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law...." We have previously recognized the textual similarity between article 1, section 19 and the Fourteenth Amendment. *See, e.g., University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger v. City of Houston*, 3 S.W. 249, 252-53 (Tex. 1887).

1876, article 392 of the Texas Penal Code of 1857 provided that adultery was a crime punishable by fine. A mere three years after the passage of the 1876 Texas Constitution, the Texas Legislature revised the Penal Code, but retained the provision criminalizing adultery. *See* TEX. PENAL CODE art. 336 (1879). The prohibition against adultery continued for almost a century until it was finally repealed in 1973. *See* Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 992, *repealing* TEX. PENAL CODE art. 499 (1925). While the constitution's framers may have been willing to die for the right of free expression, *see Davenport*, 834 S.W.2d at 7, there is no indication they were willing to make any sacrifice for the right to commit adultery.[6]

Implicitly conceding that the original intent of the Texas Constitution did not encompass a right to commit

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[6] Justice Spector's concurrence faults our analysis for resting "almost entirely on the fact that 'adultery was a crime' at the time our constitution was ratified." *Infra*, _ S.W.2d _. This mischaracterizes our rationale. We first examined the text of our state charter, and, finding no express provision protecting Henry's activity, we then analyzed whether there was any historical basis for the conclusion that the right to commit adultery was an essential component of life, liberty, or property. While we analyzed the criminal law that existed at the time of the constitution's ratification to assist us in our historical inquiry, the criminal law was not the dispositive factor in our decision. Moreover, there is nothing in our opinion today substantiating the concurrence's claim that we believe individual rights are "frozen in time, limited to conduct or actions that were legal and accepted more than one hundred years ago." *Id.* at _.

adultery, Henry contends his conduct is constitutionally protected because it is no longer illegal. However, there are two major fallacies with this argument. First, the mere fact that conduct is no longer illegal does not make it constitutionally protected. Adultery is no longer a statutory violation in Texas, but it is still not favored by the law. In fact, Texas specifically allows courts to consider adultery in granting a divorce or in dividing community assets. *See* TEX. FAM. CODE §§ 3.03, 3.63; *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980); *Morrison v. Morrison*, 713 S.W.2d 377, 379 (Tex. App.--Dallas 1986, writ dism'd). Second, the fact that constitutional guarantees continue to evolve over time does not mean that we are allowed to create new guarantees that are not present in either the text or the intent of the constitution. Moreover, Henry's argument is illogical. To follow Henry's argument to its logical end would require us to rule that legislative action concerning any type of conduct would establish its constitutionality. Such an untenable position would place the Constitution at the mercy of the Legislature.

Accordingly, we find no basis for the argument that adultery is protected as a fundamental right under the Texas Constitution. Borrowing from the *Bowers* analysis, Henry's conduct is not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition.

In concluding that Henry's conduct deserves constitutional protection, both Justice Spector's concurring opinion and the court of appeals ostensibly rely upon this Court's analysis in *TSEU*. *Infra*, _ S.W.2d at _; 910 S.W.2d at 551. However, as discussed previously, *TSEU* did not concern the constitutionality of individual conduct; instead it focused on the constitutionality of the government's intrusion. The sole issue presented in this case is whether

conduct involving an affair by one police officer with the wife of another officer is a fundamental right. There is simply nothing in *TSEU* providing any support for the argument that adultery is such a fundamental right. Reliance on *TSEU* is therefore unfounded.

While the court of appeals nominally referred to *TSEU*, it did not apply the facts of this case to any of the constitutional provisions discussed in *TSEU*. Instead, the appellate court relied upon the analysis in *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984); and *Fabio v. Civil Serv. Comm'n*, 414 A.2d 82 (Pa. 1980). *Thorne*, which involved a polygraph, and *Fabio* were both decided before *Bowers*. In *Fleisher*, the Court actually relied upon Bowers to "hold that the [Police] Department did not violate Fleisher's right of privacy by terminating him because of his admitted misconduct." *Fleisher*, 829 F.2d at 1498. These cases simply do not provide any support for the argument that Chief Pilant could not consider Henry's conduct in making the promotion decision at issue in this case.

Considering the Texas Constitution as a whole and article I, section 19 in particular, the historical context in which the Texas Constitution was conceived and has lived, actions by the Texas Legislature, and judicial decisions, we conclude that the Texas Constitution does not provide a right of privacy for a police officer who was denied a promotion because he had a sexual affair with the wife of another police officer. This conclusion does not mean, however, that the government is free to engage in intrusive investigation methods to determine the sexual practices of individuals.

IV

The City requests this Court to render judgment in its favor for attorney's fees. The Local Government Code provides that the trial court "may award reasonable attomey's fees to the prevailing party" in an appeal from a civil service determination. TEX. LOC. GOV'T CODE § 143.015(c). The use of the word "may" in the statute vests discretion in the trial court to either deny or award such fees. *See Turner v. City of Carrollton Civil Serv. Comm'n*, 884 S.W.2d 889, 895 (Tex. App.--Amarillo 1994, no writ). The trial court has not yet exercised its discretion with regard to this issue. Therefore, we remand this cause to the trial court for consideration of the City's attorney's fees request.

In conclusion, the failure to promote Henry for having a sexual affair with the wife of a fellow police officer did not implicate Henry's right to privacy under either the United States Constitution or the Texas Constitution. Because the parties otherwise concede that substantial evidence supports the Police Chief's decision not to promote Henry, we reverse the judgment of the court of appeals and render judgment in favor of the City of Sherman. We remand to the trial court to determine the attorney's fees, if any, which should be awarded to the City as the prevailing party in this cause.

s/ Greg Abbott
Greg Abbott
Justice

OPINION DELIVERED: July 8, 1996

APPENDIX A--CONCURRING OPINION OF JUSTICE SPECTOR, DATED JULY 8, 1996

THE SUPREME COURT OF TEXAS

No. 95-1195

CITY OF SHERMAN, PETITIONER

v.

OTIS HENRY, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on February 14, 1996

JUSTICE SPECTOR, concurring.

Nine years ago, the right of privacy under the Texas Constitution prevented the state from asking employees whether they had ever stolen or whether they had beaten their children. *See Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation*, 746 S.W.2d 203, 204,206 (Tex.1987). Today, the majority announces that the Texas Constitutional right of privacy has somehow shriveled to the point that the most personal aspect of our lives are the government's business. The majority seizes the opportunity to abridge this fundamental right in a case in which the core dispute between the parties is moot: Otis Henry, who filed this suit after he was denied a promotion because he had an affair with Sergeant Tom Pollard's wife,

has long since been promoted. The Pollards have divorced, reconciled, and remarried. I concur in the Court's judgment, but I cannot join in a gratuitous opinion that so narrowly and unreasonably circumscribes a precious fundamental right.

In *TSEU*, a unanimous Court expressed no doubt "that a right of individual privacy is implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights." *Id.* at 205 (citing TEX. CONST., art. I, Introduction to the Bill of Rights). Then, we held that "the Texas Constitution protects personal privacy from unreasonable intrusion." *Id.* That was then.

In order to pronounce its views on morality (and transform them into law), the majority resorts to a time-honored rhetorical tactic: Reframe the issue in a way that assures the answer you want. This case is no more about Henry's fundamental "right to have a sexual affair with the wife of another," *supra*, __ S.W.2d__, than *TSEU* was about the fundamental right of public employees to conceal theft or child abuse; instead, "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" *See Bowers v. Hardwick*, 478 U.S. 186,199 (1986) (Blackmun, J., dissenting)(quoting *Olmstead v. United States*, 277 U.S. 438,478 (1928)(Brandeis,J., dissenting); *see also Billings v. Atkinson*, 489 S.W.2d 858,859 (Tex. 1973)(holding that an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted).

The only issue here concerns the individual's right to enter into intimate personal relationships, secure in the knowledge that our Constitution protects the relationship

from intrusion by the government in the absence of a compelling state interest. *See TSEU*, 746 S.W.2d at 206; *see also Stanley v. Georgia*, 394 U.S. 557,564 (1968)("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."). I strongly disagree that Henry's claim does not implicate a privacy interest protected by the Texas Constitution. If the right Henry asserts is not "implicit in the concept of liberty," then the right we recognized in *TSEU* is no more than a hollow shell.

I believe the City infringed Henry's privacy rights at two points: First, when the police chief ordered his internal affairs division to investigate rumors of Henry's liaison, and later, when it denied Henry the promotion to which he would clearly have been entitled. *See Thorne v. City of Segundo*, 726 F.2d 459,468 (9th Cir. 1983) (stating that the plaintiff's constitutional privacy interests were implicated both when the defendants "forc[ed] her to disclose information regarding personal sexual matters" in a polygraph test and when the defendants "refused to hire her as a police officer based in part on her prior sexual activities"). The majority's assertion that "there can be no serious contention ... that the City intruded into the private affairs of Henry" is unfathomable. Henry never volunteered information about his relationship with Kelly Olson until *after* he had been denied the promotion. It was only at the hearing on his appeal to the Civil Service Commission that Henry finally stipulated that the affair actually occurred.

While the majority downplays the City's investigation in this case, it is undisputed that the police chief ordered his internal affairs officer to investigate the rumored affair. In this unique situation, the affair was substantiated by Sergeant Pollard, the offended husband, and required no

further investigation. The report Pollard provided indicated that he had driven by Henry's house and the couple's trysting spots to confirm his suspicions. He searched for and found deeply personal love letters and cards from Henry to his wife that she had hidden in a box, under dried flowers, in the bottom of her closet. All of this "evidence" was given to the internal affairs investigator, who in turn, reported to the police chief. After denying the promotion, the City then offered Pollard's report and one of the letters as evidence in the hearing before the Civil Service Commission. These sensitive documents now form part of the public record in this case. Pollard's personal stake makes his attempt to learn the truth understandable but does not justify the official investigation that was ordered here. The City clearly invaded Henry's constitutionally-protected privacy interests when it inquired into his off-duty, consensual sexual conduct. *See Woodland v. City of Houston*, 918 F.Supp. 1047, 1054 (S.D. Tex. 1996).

Even if there had been no investigation and Henry had voluntarily disclosed the affair, however, Henry's privacy rights were implicated when the police chief denied the promotion based solely upon his affair with Olson. *See Thorne v. City of Segundo*, 726 F.2d at 468, 471. The majority's conclusion that Henry did not assert a constitutionally-protected right rests almost entirely on the fact that "adultery was a crime" at the time our Constitution was ratified. __S.W.2d at __. The majority's constitutional analysis thus implies that the scope of individual rights under the Texas Constitution is frozen in time, limited to conduct or actions that were legal and accepted more than one hundred years ago. This analysis is inconsistent with this Court's opinion in *Davenport v. Garcia*, 834 S.W.2d 4,10,19 (Tex. 1992)("[H]istorical analysis is only a starting point .... In no way must our understanding of [our

Constitution's] guarantees be frozen in the past; rather, our concept of freedom of expression continues to evolve over time.")(citations omitted). If it is true that Henry asserts no constitutionally-protected right because adultery was illegal in 1876, then the privacy right we recognized in *TSEU* also does not protect a woman's right to choose to terminate a pregnancy, *see* TEX. PENAL CODE art. 536 (1879), or the right of an interracial couple of marry, *see* TEX. PENAL CODE art. 326 (1879).[1]

The fact that Henry asserts a constitutionally-protected right to privacy is not dispositive, however. In *TSEU*, we recognized that the right to privacy is not unlimited, but should "yield ... when the government can demonstrate that the intrusion is reasonably warranted for the achievement of a compelling governmental objective ...." *TSEU*, 746 S.W.2d at 205. The trial court in this case concluded that the police chief erred in denying Henry's promotion. I differ from the trial court because I believe the record shows that the department had a compelling interest justifying its action.

We acknowledged in *TSEU* that police departments, unlike most public agencies, are quasi-military organizations

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[1] Interestingly, interracial marriage was a far more serious crime than adultery at the time our constitution was adopted: While adultery was subject only to a fine of $100 to $1000, interracial marriage called for at least two years' imprisonment. *See* TEX. PENAL CODE art. 333, art. 336 (1879). Further, adultery was punishable only if the couple was living together or engaging in "*habitual* carnal intercourse." TEX. PENAL CODE art. 333 (1879)(emphasis added).

that may require "unquestioning obedience." *Id.* at 206. Here, the record contains substantial evidence that Henry's conduct had, at some point, intruded into the workplace and cast doubt upon his ability to command the trust and obedience necessary in a paramilitary organization. It was not unreasonable for the chief to conclude that Henry's betrayal of his fellow officer's trust had undermined his ability to assume a leadership position. Under these circumstances, the police chief's decision to pass Henry over until this volatile situation was resolved was justified.

Because I believe that the record contains substantial evidence that the City had a compelling interest in denying Henry's promotion, I join in the Court's judgment. I cannot, however, join in the majority's unnecessary and unjustified constriction of the fundamental constitutional right to privacy.

s/Rose Spector
Rose Spector
Justice

OPINION DELIVERED: July 8, 1996

APPENDIX A--CONCURRING OPINION OF JUSTICE OWEN, DATED JULY 8, 1996

THE SUPREME COURT OF TEXAS

No. 95-1195

CITY OF SHERMAN, PETITIONER

v.

OTIS HENRY, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on February 14, 1996

Concurring opinion by JUSTICE OWEN.

I join only in the judgment of the Court. The opinion of the Court is broader than necessary to decide the very narrow issue in this case, which is: *assuming* Officer Henry had a cognizable constitutional right, could the City of Sherman deny him a promotion when his adulterous affair with the wife of a fellow police officer led to disruption in the department. The answer obviously is yes. The Court need not engage in an extended discussion of a host of constitutional issues and principles of constitutional law to resolve this case.

I

The right of privacy which the United States Supreme Court and this Court have recognized is not absolute. *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987)("TSEU"). Even where fundamental rights are implicated, some regulation of those rights may be justified by a compelling state interest. *Roe*, 410 U.S. at 155 (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621,627 (1969)).

In defining the parameters of the right of privacy, this Court has also observed that a state may have interests as an employer that differ significantly from those it possesses with regard to the public generally. *TSEU*, 746 S.W.2d at 205. *See also Pickering v. Board of Educ.*, 391 U.S. 563,568 (1968)("the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"). The interests of the State are even more compelling in the oversight of police officers and other quasi-military organizations because of the state's goal of protecting the safety of the general public. *TSEU*, 746 S.W.2d at 205-06. In contrasting the differences between employees of the Texas Department of Mental Health and Mental Retardation and of a police department, we noted with approval a trial court's finding that:

> the Department [of Mental Health and Mental Retardation] serves a different function and stands in a different posture in regard to the public as compared with a police department and that the unquestioning obedience required of police officers and

> members of other quasi-military organizations is not required of Department employees. Texas courts have shown deference to the important interests served by public agencies that are directly involved in the compelling state goal of protecting the safety of the general public.

Id. at 206. We agreed with the trial court that "the unique circumstances that may justify requiring police and fire personnel to take polygraph examinations" did not exist with respect MHMR employees. *Id.*

Accordingly, the right to privacy precludes intrusion into the lives of some state employees, but there are circumstances that warrant such an intrusion into the lives of police officers. *See generally Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. __, __ (1995)(noting the Supreme Court has upheld random drug testing of federal customs officers who carry arms or are involved in drug interdiction in upholding random drug testing of high school and middle school athletes against Fourth Amendment and right of privacy challenges.)

In the case before us today, Officer Henry sought a promotion. He was denied that promotion because he had an affair with the wife of Tom Pollard, a fellow officer. There is no question that the affair was highly disruptive to the relationship between that officer and Henry. There is evidence that Henry's conduct was also disruptive within the police department generally. Henry was seeking to assume a position of greater leadership. Yet, he had jeopardized his ability to command within an organization that requires "unquestioning obedience" from its members. The City's decision to deny a promotion to Henry under these

circumstances was an action "narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155. Indeed, Henry was promoted when another position became available and presumably, when the disruption created by his relationship with the wife of a fellow officer had dissipated.

The exercise of a fundamental right, even if Henry's association with Pollard's wife could be so characterized, is not absolutely immune from regulation. Suppose that Officer Henry's conduct had not been an affair with Pollard's wife, but that Henry had insulted, derided and ridiculed Pollard and other officers during off-duty hours over a course of months, to the point that there was strong hostility and disruption within the department. Henry has a right of free speech, but at some point that must give way to the needs of the state in disciplining its police officers. Under some circumstances, a police officer's exercise of free speech rights can be taken into account by the City in deciding if there is "a valid reason" within the meaning of Texas Local Government Code section 143.036(f) to deny promotion.[2] The United State Supreme Court has indicated

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[2] Section 143.036(f) provides:

> Unless the department head has a valid reason for not appointing the person, the department head shall appoint the eligible promotional candidate having the highest grade on the eligibility list. If the department head has a valid reason for not appointing the eligible promotional candidate having the

that even comments by a state employee on matters of public concern may furnish grounds for discharge where a question of maintaining harmony among coworkers is presented and personal loyalty and confidence are necessary to the proper functioning of close working relationships. *Pickering*, 391 U.S. at 570 & n. 3. ***But see Rutan v. Republican Party of Illinois***, 497 U.S. 62, 74-75 (1990)(promotions, transfers and recalls of state employees other than certain high-level ones could not be based on political affiliation).

Under the facts of this case, the conduct of Henry was directly related to his job as a police officer and involved the wife of another police officer. There was evidence that Henry's conduct impaired his ability to commend the trust and respect of those with whom he would work very closely in preserving the peace and protecting the public. The City was justified in denying the promotion even if the constitutional test of a "compelling state interest" is applied.

> highest grade, the department head shall personally discuss the reason with the person being bypassed before appointing another person. The department head shall also file the reason in writing with the commission. On application of the bypassed eligible promotional candidate, the reason the department head did not appoint that person is subject to review by the commission.
>
> TEX. LOC. GOV'T CODE § 143.036(f).

II

The potential breadth of the Court's opinion causes me some concern. The opinion may be read to decide issues not before us, issues that we have not carefully considered in light of our own decisions and decisions of the United States Supreme Court. Assume, for example, that Henry had an adulterous affair with the wife of someone wholly unrelated to the police department and that Henry's conduct had no disruptive effect within the police department. Could Henry be denied a promotion because of his immoral but legal association with a married woman? What if Henry were not a man, but an unmarried woman who gave birth to the child of a married man who had no connection with the police department? Would we say that the City could discharge her or deny her a promotion because of her adulterous conduct? Would such actions raise a constitutional question about the right to bear or beget a child which the United States Supreme Court has said is a fundamental "right of the *individual*, married or single" that must be free from unwarranted governmental intrusion? *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original). *See also Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942)(striking down statute calling for involuntarily sterilization of a thrice convicted felon, and holding that "[m]arriage and procreation are fundamental to the very existence and survival of the race"). I do not presume to answer these questions, but the Court's opinion today could be viewed as doing do.

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For the foregoing reasons, I join only in the judgment of the Court.

s/Priscilla R. Owen
Priscilla R. Owen
JUSTICE

OPINION DELIVERED: July 8, 1996

APPENDIX A--JUDGMENT OF SUPREME COURT OF TEXAS, DATED JULY 8, 1996

THE SUPREME COURT OF TEXAS

No. 95-1195

CITY OF SHERMAN, PETITIONER
V.
OTIS HENRY, RESPONSE

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fifth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) Judgment is rendered in favo of City of Sherman;

3) The cause is remanded to the trial court for further proceedings in conformity with the opinion of this Court;

4) City of Sherman shall recover from Otis Henry, who shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fifth District and to the District Court of Grayson County, Texas, for observance.

(Opinion of the Court delivered by Justice Abbott, joined by Chief Justice Phillips, Justice Gonzalez, Justice Hecht, Justice Cornyn, Justice Enoch, and Judge Baker)

(Concurring opinion by Justice Spector)
(Concurring opinion by Justice Owen)

July 8, 1996
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APPENDIX A--LETTER REFLECTING DENIAL OF REHEARING WITHOUT WRITTEN ORDER, DATED SEPTEMBER 19, 1996

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 19, 1996

Mr. Ronald H. Clark
Wolfe Clark Henderson & Tidwell
123 North Crockett, Suite 100
Sherman, TX 75090

Mr. Robert E. Richardson, Jr.
118 South Crockett
Sherman, TX 75090-5906

RE: Case Number 95-1195
Style: CITY OF SHERMAN
v.
OTIS HENRY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by: s/ Michael Kopp
Michael Kopp, Deputy

APPENDIX B--OPINION OF THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS, DATED AUGUST 28, 1995

AFFIRM in part, **REVERSE** in part and **REMAND** and Opinion Filed August 28, 1995

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-94-00055-CV

CITY OF SHERMAN, Appellant

V.

OTIS HENRY, Appellee

On Appeal from the 336th District Court
Grayson County, Texas
Trial Court Cause No. 92-0720

OPINION ON MOTION FOR REHEARING

Before Chief Justice Thomas and Justices Maloney and Chapman
Opinion By Chief Justice Thomas

Appellant's motion for rehearing is granted. We

withdraw our opinion of May 25, 1995, and substitute the following opinion in its place. We also vacate our previous judgment.

In this case, we must decide whether a public employee's private, legal sexual conduct is protected under the Texas Constitution. Further, if such a constitutional right of privacy exists, we must decide whether the City of Sherman (the City) established that it had a compelling governmental interest that could be achieved by no less intrusive, more reasonable means.

The City's police chief refused to promote appellee, Otis Henry, to the rank of sergeant based solely on appellee's off-duty, private, legal sexual conduct. The Sherman Civil Service Commission (the Commission) upheld the police chief's decision. Appellee sought judicial review of the Commission's decision in the district court. The trial court found the police chief's actions violated appellee's right of privacy under the United States and Texas Constitutions. Because it held appellee's private conduct was constitutionally protected, the trial court concluded that such conduct did not constitute a "valid reason" for denying the promotion. *See* TEX. LOCAL GOV'T CODE ANN. § 143.036(f) (Vernon Supp. 1995). Accordingly, the trial court rendered summary judgment in appellee's favor. In four points of error, the City generally argues the trial court erred in: (i) granting appellee's motion for summary judgment; (ii) denying its motion for summary judgment; (iii) awarding attorney's fees to appellee; and (iv) denying its attorney's fees.

We affirm the trial court's judgment as it relates to the constitutional issues because appellee's conduct is protected by the Texas Constitution, and the City did not

prove that it had a compelling governmental interest that could be achieved by no less intrusive, more reasonable means. We reverse the trial court's judgment as it relates to attorney's fees and remand for a trial on the issue of attorney's fees.

FACTUAL BACKGROUND

1. The Secret Marriage

Kelly Olson and Tom Pollard were both employed by the Sherman Police Department. Olson worked as a dispatcher and Pollard served as a sergeant in the patrol division. Olson and Pollard were married on September 30, 1989; however, the couple kept their marriage a secret for nearly two years because the police department had a nepotism policy prohibiting marriage between employees.[3]

In April 1991, appellee, a Sherman police officer, began dating Olson. Because appellee knew Olson and Pollard were living together, he asked Olson if they were married. Olson at first assured appellee that she was not married. However, three months later Olson told appellee that she and Pollard were, in fact, married. Shortly after Olson told appellee she was married, Olson and Pollard filed a statement with the City acknowledging their marriage.

Appellee responded to the announcement by writing a letter to Olson. In the letter, appellee told Olson, "I'm

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[3] While the record is unclear on this point, it appears the department's nepotism policy prohibited marriage but not cohabitation.

going to give you room, to stay out of your life, and try not to pressure you." The record, however, does not clearly indicate how long appellee stayed away from Olson. After receiving appellee's letter, Olson and Pollard attempted a reconciliation. Within a month, however, the two separated and filed for divorce. Following the attempted reconciliation, Olson and appellee resumed dating.

2. The Sergeant's Position

Rumors of the Olson-appellee relationship began to circulate in the police department eight months after the relationship began, when a sergeant's position became available. At that time, the City's director of personnel/civil service sent a list to the police chief naming the top three candidates on the current civil-service list who were eligible for promotion to sergeant. Appellee was ranked first on the list.

Appellee's score from the civil-service exam plus his seniority points totaled ninety. The next two candidates on the list each had total scores of eighty-six. Additionally, appellee had completed all Texas Commission on Law Enforcement certification procedures, earned a bachelor's degree in criminal justice, and received numerous commendations. In fact, appellee was honored as "Outstanding Officer of the Year" in 1991.

After the sergeant's vacancy was posted and the civil-service list received, the police chief asked a lieutenant to informally investigate the rumors regarding the Olson-appellee relationship. Although it is unclear from the record who actually led the investigation, it resulted in a report prepared solely by Pollard while his divorce from Olson was pending. The report concluded appellee had

been involved in an affair with Olson. This conclusion was based in part on copies of private correspondence between appellee and Olson that Pollard found hidden in Olson's closet. The private correspondence was attached to Pollard's report.

A few days later, a computer-generated sign was posted on a bulletin board in the police department and placed in most officers' mailboxes. The sign stated: "If you can't trust another officer with your wife, how can you trust him with your life?" At about the same time, appellee went to the police chief because he had heard rumors the chief was considering passing him over for the promotion. At the meeting, the police chief confronted appellee about the rumors concerning the relationship with Olson. Appellee did not deny the truth of the rumors.

A month after receiving Pollard's report, the police chief ultimately refused appellee's promotion. The police chief explained his decision was based entirely on appellee's relationship with Olson. In his written explanation, the chief stated he believed (i) appellee would not command respect and trust from rank and file officers or other members of the department, and (ii) appellee's promotion would adversely affect the efficiency and morale of the department.

3. The Record Presented to the Commission

Appellee appealed the police chief's decision to the Commission. At the Commission hearing, the City called four witnesses to show it had a valid reason for refusing to promote appellee.

At the hearing, the police chief testified he did not

promote appellee because of his relationship with Olson and the impact it would have on appellee's ability to perform his duties. However, the police chief never specifically stated how appellee's ability to perform his duties was affected. Instead, he focused on the effect that knowledge of the relationship had on the department. The police chief acknowledged that appellee was very qualified for the sergeant's position. He admitted, however, that he did not consider any of appellee's qualifications because he was "blinded" by the Olson-appellee relationship. In making his decision. The police chief relied on Pollard's report and the private correspondence to conclude that the relationship existed. The chief admitted that he had no reason to suspect that any sexual activity took place while appellee was on duty. When describing the impact the relationship had on the department. the chief pointed to the following facts: (i) Pollard took some sick leave and seemed distraught; (ii) there were rumors among the officers about this relationship; and (iii) the sign posted on the bulletin board. The chief concluded that other than the sign, a few rumors, and innuendo, he had no first-hand knowledge of dissension within the department.

The police chief had never before passed over a candidate for promotion. In explaining his decision in this matter, the police chief acknowledged there was no written rule in the department's manual or in state law authorizing him to deny appellee the promotion. Rather, the police chief stated he had an unwritten policy that he would not promote anyone having an affair with the spouse of a fellow officer. Elaborating on this unwritten rule, the chief said he would also refuse to promote anyone having a relationship with the girlfriend or boyfriend of a fellow officer. However, when the chief was asked if he would promote Pollard to lieutenant if Pollard were known to have had an affair with

a fellow officer's wife, the chief responded that he could not say because he would have to consider each incident on a case-by-case basis. In appellee's case, however, the chief categorically stated that he was blinded by appellee's relationship with Olson and was unable to even consider any of appellee's numerous qualifications.

Sergeant Blankenship, appellee's immediate supervisor, testified that this situation had adversely affected his shift because officers were spending time talking about the propriety of the relationship. However, Blankenship also noted that there was still "good order and discipline" on his shift. Blankenship also acknowledged he had evaluated appellee twice after the affair began, and he had not rated any aspect of appellee's performance as unsatisfactory in either evaluation. While Blankenship noted in the evaluations that appellee was the next officer on the promotion list, he made no notations indicating whether appellee should or should not be promoted.

Dwayne Barber, a criminal justice instructor at Grayson County College, testified as an expert witness. He said that, in general, promoting an officer who had an affair with another officer's wife would have an adverse impact on the police department. In particular, Barber believed that other officers might have difficulty trusting such an officer. He admitted, however, that his opinion might change if the officer did not know the woman was married when the affair began. Barber further testified that although this relationship had been common knowledge for at least three months at the time of the Commission hearing, he had observed no morale problems in the police department.

Barber's perception was corroborated by Captain Caylor, a twenty-one-year veteran of the police department.

Caylor testified the department's morale had not been affected. He further testified he was not concerned by the fact the sign was posted on the bulletin board because officers frequently post signs making fun of fellow officers.

Appellee called two witnesses on his behalf, Olson and himself. Olson explained that she and Pollard did not inform the City they were married until July 1991 because they both wanted to continue working for the department. Olson also testified that by the time she told appellee in June 1991 that she was married, their relationship had become serious. In fact, she said that by the time she told him she was married, appellee had sent her several letters telling her he had fallen in love with her.

Appellee testified he had fallen in love with Olson by the time she told him she was married. He also testified that he still loved Olson and that they were again seeing each other. Appellee further stated that he had not experienced any conflicts on the job, even after the sign was posted on the bulletin board.

PROCEDURAL POSTURE

After the Commission decided the police chief had a valid reason for not promoting appellee, appellee appealed to the district court. Appeals to the district court from civil service-commission decisions are authorized by the local government code. TEX. LOCAL GOV'T CODE ANN. § 143.015 (Vernon 1988). In the district court, appellee did not challenge the Commission's fact findings. Rather, he alleged the basis for the police chief's decision not to promote him was unconstitutional. The application of strict scrutiny when reviewing whether the government has violated a citizen's constitutional rights is a matter of law. *See Woodland v. City*

of Houston, 940 F.2d 134, 138 (5th Cir. 1991). Consequently, the trial court held that as a matter of law the City had violated appellee's constitutional rights. The City appealed to this Court challenging the district court's ruling on this matter of law.

The City argues we should review this question of law under the substantial evidence rule. We disagree. When reviewing administrative agency decisions, questions of law are not entitled to a presumption of validity. *See Texas Workers' Compensation Ins. Facility v. State Bd. of Ins.*, 894 S.W.2d 49, 52 (Tex. App.–Austin 1995, no writ). Neither a district court nor an appellate court is bound by an administrative agency's interpretation of the law. *See Sonic Drive-In v. Hernandez*, 797 S.W.2d 254, 257 (Tex. App.–Corpus Christi 1990, writ denied). In fact, the only time courts should give serious consideration to an agency's legal interpretation is when the agency is construing the statute that it is charged to enforce. *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). Thus, whether the City's action violated the United States or Texas Constitution is not reviewed under the substantial evidence rule. *See, e.g., Firemen's & Policemen's Civil Serv. Comm'n v. Hamman*, 404 S.W.2d 308, 312 (Tex. 1966) (analyzing whether an administrative proceeding denied a party procedural due process).

Further, this constitutional issue was not before the Commission. In seeking judicial review of the Commission's ruling, appellee alleged for the first time that the City relied on unconstitutional grounds when it decided not to promote him. Parties seeking to challenge civil-service-commission decisions on constitutional grounds may first do so in the trial court. *See Turner v. City of Carrollton Civil Serv. Comm'n*, 884 S.W.2d 889, 894 (Tex. App.- Amarillo 1994,

no writ); *Paz v. City of Houston*, 748 F. Supp. 480, 484 (S.D. Tex. 1990). Because we do not defer to an agency's determination of a matter of law and because the constitutional issue was not heard by the Commission, it would be improper for us to defer to the Commission by reviewing this constitutional question under the substantial evidence standard. Thus, we will review the constitutional question de novo and in accordance with the traditional standard of review for summary judgments.

SUMMARY JUDGMENT

In the first two points of error, the City contends the trial court erred in (i) granting appellee's motion for summary judgment and (ii) denying its motion for summary judgment.

1. Standard of Review

The function of summary judgment is not to deprive a litigant of the right to a full hearing on the merits of any real issue of fact but to eliminate patently unmeritorious claims and untenable defenses. *See Gulbenkian v. Penn*, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (Tex. 1952). In reviewing a summary judgment record, this Court applies the following standards:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
>
> 2. in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true.

3. Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in his favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

When two parties file motions for summary judgment and one is denied and the other granted, we may review the denial and render judgment if the appealing party complains of both the granting of the opponent's motion and the denial of its own. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). Further, when the parties do not dispute the facts, we review all legal questions presented. *Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993). When crossmotions for summary judgment deal solely with the interpretation of federal and state constitutions, the sole issue before the court is a matter of law. We determine de novo whether a party's right to prevail is established as a matter of law. *Elam v. Yale Clinic*, 783 S.W.2d 638, 641 (Tex. App.–Houston [14th Dist.] 1989, no writ).

The City moved for summary judgment claiming as a matter of law its reason for not promoting appellee was valid. The City admitted there were no disputed facts and included among its summary judgment proof the statement of facts from the Commission hearing. Appellee also moved for summary judgment and agreed the facts were undisputed. Moreover, appellee adopted by reference the City's summary judgment proof as his own. Thus, on crossmotions for summary judgment, the trial court was presented solely with two questions of law: (i) Was appellee's conduct protected by the United States or Texas Constitution; and (ii) Did the City have a compelling governmental interest that could be achieved by no less

intrusive, more reasonable means?

2. The Burdens of Proof

Under the Texas Constitution, appellee bears the burden of proving that his conduct implicates the protection of the Texas right of privacy. *See Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (*TSEU*). If the Texas right of privacy is implicated, the City may still prevail if it can conclusively establish it has a compelling governmental interest that can be achieved by no less intrusive, more reasonable means. *TSEU*, 746 S.W.2d at 205. Thus, the City is in a position analogous to having an affirmative defense. As a movant for summary judgment who asserts the facts are undisputed, the City must conclusively establish each essential element of its affirmative defense or negate an element of appellee's claim to be entitled to summary judgment. *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 657 (Tex. App.–Dallas 1992, no writ).

A defendant asserting an affirmative defense may be able to avoid the plaintiff's summary judgment by asserting that fact issues exist regarding its affirmative defense. In this case, the City did not make that argument. In fact, the City explicitly claimed the facts were undisputed and it was entitled to judgment as a matter of law. Motions for summary judgment must stand or fall on the grounds specifically set forth in the motions. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339 (Tex. 1993). Further, on appeal the City claims only that the trial court erred in granting appellee's motion for summary judgment and in denying the City's motion for summary judgment. Significantly, the City does not raise a point of error alleging the existence of fact issues. We do not reverse a trial court's

judgment on the basis of unassigned error. *American Gen. Fire & Casualty Co. v. Weinberg*, 639 S.W.2d 688, 689 (Tex. 1982); *Nationwide Property & Casualty Ins. Co. v. McFarland*, 887 S.W.2d 487, 496 (Tex. App.--Dallas 1994, writ denied).

3. The Constitutional Challenge

In his motion for summary judgment, appellee argued that the police chief's reason for passing him over was constitutionally infirm and therefore was not a "valid reason" for failing to promote him. *See* TEX. LOCAL GOV'T CODE ANN. § 143.036(f) (Vernon Supp. 1995).[4] Thus, we must determine whether the state or federal constitution's right of privacy is implicated when a public employer fails to promote an employee based on the employee's off-duty,

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[4] Section 143.036(f) of the local government code provides:

> Unless the department head has a valid reason for not appointing the person, the department head shall appoint the eligible promotional candidate having the highest grade on the eligibility list. If the department head has a valid reason for not appointing the eligible promotional candidate having the highest grade, the department head shall personally discuss the reason with the person being bypassed before appointing another person. The department head shall also file the reason in writing with the commission. On the application of the bypassed eligible promotional candidate, the reason the department head did not appoint that person is subject to review by the commission.

private, sexual conduct. When, as here, violations of both the state and federal constitutions are alleged, we look first to the Texas Constitution, basing our decisions on it whenever possible. *Ex parte Tucci*, 859 S.W.2d 1, 5 (Tex. 1993); *Davenport v. Garcia*, 834 S.W.2d 4, 17 (Tex. 1992). If the challenged action violates our state constitution, consideration of any federal claim is unnecessary. *Davenport*, 834 S.W.2d at 11.

The Texas Supreme Court has addressed the need for a fully developed record when determining constitutional questions on summary judgment. *Brady v. Fourteenth Court of Appeals*, 95 S.W.2d 712, 715 (Tex. 1990) (orig. proceeding). In *Brady*, the court noted:

> Application of a constitutional balancing test is particularly dependent on a fully-developed factual record.... [R]esolving the constitutional issue necessarily requires factual determinations. It is perhaps possible that the evidence to support the various balancing test factors could be stipulated or otherwise be undisputed and presented in a form that would allow meaningful constitutional analysis. We need not decide that question because it clearly is not presented in this case. Here [the parties] explicitly maintained that the facts were disputed and asserted their rights to develop fully the factual record.

Brady, 795 S.W.2d at 715.

In this case, the parties had a chance to fully develop the factual record in the hearing before the Commission and both parties have incorporated the statement of facts from that hearing into their summary judgment evidence. Further,

both parties agree that all material facts are undisputed. Thus, we conclude it was proper for the district court to decide these questions of constitutional law on summary judgment.

A. The Texas Constitution

The Texas Constitution accords individuals greater safeguards for their personal freedom than does its federal counterpart. See *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) (holding the Texas Constitution has independent vitality).[5] To allow the federal courts' interpretation of the federal constitution to dictate, as a matter of course, the precise boundaries of our state constitutional guarantees is at odds with the fundamental tenets of our dual system of constitutional adjudication. Under our system of federalism. it is the states' responsibility to interpret and apply their state constitutions independently. *See LeCroy*, 713 S.W.2d at 338-39. To do otherwise would deprive Texas citizens of a critical source of protection for their rights and render moot our state constitution.

In several areas, Texas courts have relied on the state

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[5] The Texas Court of Criminal Appeals has also held that the Texas Constitution may provide greater protection than the United States Constitution. *See Autran v. State*, 887 S.W.2d 31, 42 (Tex Crim. App. 1994) (holding article one, section nine of the Texas Constitution may provide greater protection than the Fourth Amendment); *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (holding Texas courts analyzing search and seizure under the state constitution are not bound by United States Supreme Court precedent analyzing the Fourth Amendment).

constitution to find more expansive rights than those granted by the federal constitution. *See, e.g., In re J.W.T.*, 872 S.W.2d 189, 197 & n.23 (Tex. 1994) (stating the Texas due course of law guarantee has independent vitality from the due-process clause of the Fourteenth Amendment); *Ex parte Tucci*, 859 S.W.2d at 5 (stating that the Texas Constitution provides greater rights of free expression than does the federal constitution); *Davenport*, 834 S.W.2d at 8 (recognizing some aspects of the Texas free speech provision are broader than the First Amendment); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (holding that the state educational finance system violates the state constitution, although the United States Supreme Court had found no violation of the United States Constitution); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring) (stating that the rights of free speech and free press are more extensive under the state constitution than under the federal constitution); *LeCroy*, 713 S.W.2d at 338-40 (holding that the Texas Constitution's open-courts provision provides rights separate and distinct from traditional guarantees of due process). Because the Texas Constitution provides greater safeguards to personal freedom than its federal counterpart, we must enforce the provisions of the state constitution even if the federal courts have given a different interpretation to a similar provision of the federal constitution.

B. The Texas Right of Privacy

Our analysis of the Texas right of privacy is controlled by *TSEU*, 746 S.W.2d at 204-06. The *TSEU* court recognized that the Texas Bill of Rights guarantees the right of privacy. *TSEU*, 746 S.W.2d at 205. In addressing the right of privacy, the *TSEU* court broadly held:

> [T]he Texas Constitution protects personal privacy from unreasonable intrusion. This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.

TSEU, 746 S.W.2d at 205.

Although the supreme court recognized the right of privacy in *TSEU*, it did not clarify the full scope of this right. Nonetheless, this right is an essential freedom retained by the citizens of Texas. As Justice Hightower has noted, Texans should "resist any attempts to trivialize or otherwise weaken this fundamental right. It is imperative that the right to privacy under the Texas Constitution remain a vital right for the protection of all Texans." *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 203 (Tex. 1992) (Hightower, J., concurring).

Since *TSEU*, the supreme court has not elaborated on the extent of the Texas right of privacy in matters of sexual conduct. However, two lower-court cases have addressed the extent of this right in the context of sexual conduct. *City of Dallas v. England*, 846 S.W 2d 957, 959 (Tex App.–Austin 1993, writ dism'd w.o.j.) (holding the Texas sodomy statute unconstitutional); *State v. Morales*, 826 S.W.2d 201, 204-05 (Tex. App.–Austin 1992) (holding the Texas sodomy statute unconstitutional), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). Both of these cases recognize that the Texas right of privacy protects sexual behavior between consenting adults in private. *England*, 846 S.W.2d at 959; *Morales*, 826 S.W.2d at 204-05. Neither of these cases, however, addresses the precise issues with which

we are presently confronted. Notably, in our case, we are not presented with: (i) a challenge to a statute; (ii) any allegation that appellee's relationship violated any criminal laws;[6] or (iii) a challenge to a written policy of the police department. Instead, this case presents the question whether a public employee's private, legal sexual conduct is protected under the Texas Constitution. Based on the supreme court's analysis in *TSEU*, we hold that appellee's conduct is protected by the Texas Constitution.

While federal case law does not control our interpretation of our own constitution, we find two cases from the Ninth Circuit persuasive. *See Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984). Both cases address the extent of the federal

right of privacy in situations involving facts similar to those presented in this case. *Fleisher*, 829 F.2d at 1497-99; *Thorne*, 726 F.2d at 468-71.

In *Thorne*, Deborah Thorne, a female applicant for a position with a police department, was not hired because

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[6] In fact, the Texas Legislature repealed the statutes outlawing fornication and adultery in 1973. TEX. PENAL CODE ANN. art. 503 (Vernon 1925), *repealed by* Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 992 (fornication); TEX. PENAL CODE ANN. art. 499 (Vernon 1925), *repealed by* Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 992 (adultery).

she previously had a relationship with an officer still on the police force. *Thorne*, 726 F.2d at 462. Thorne received the second highest score on the written and oral tests, and she was listed as an eligible applicant for the position. *Thorne*, 726 F.2d at 462. She also successfully completed a physical agility test and a psychological screening. *Thorne*, 726 F.2d at 462.

During her required polygraph exam, Thorne was asked detailed questions about a miscarriage she had suffered. *Thorne*, 726 F.2d at 462. One of these questions asked who the father of the child was. *Thorne*, 726 F.2d at 462. Thorne reluctantly acknowledged that the father was a married officer still on the force. *Thorne*, 726 F.2d at 462. Contrary to the results of earlier psychological and physical exams, the polygraph examiner concluded that Thorne lacked sufficient aggressiveness, self-assuredness, or probable physical ability to handle herself in stressful situations. *Thorne*, 726 F.2d at 462. Based on this conclusion, the department refused to hire Thorne. Thorne sued the police department, claiming in part that the handling of the polygraph examination and its results by the individual defendants invaded her constitutionally protected right of privacy. *Thorne*, 726 F.2d at 468.

In analyzing Thorne's claim of constitutional violations, the Ninth Circuit explained the federal constitution protects two kinds of privacy interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. The court concluded that "[t]he interests Thorne raises in the privacy of her sexual activities are within the zone protected by the constitution." *Thorne*, 726 F.2d at 468.

The Ninth Circuit revisited this issue four years later in *Fleisher*. While reaffirming its decision in *Thorne*, the court in *Fleisher* elaborated on its analysis of the right of privacy and took efforts to differentiate the facts in *Fleisher* from those in *Thorne*. *Fleisher*, 829 F.2d at 1497-98. In *Fleisher*, Signal Hill hired Gerry Fleisher as a probationary police officer in February 1983. *Fleisher*, 829 F.2d at 1493. In June 1983, a woman filed a forcible rape charge against another officer in the department. During the investigation of the charge, the woman acknowledged that she had had sexual relations with Fleisher several years previously while she was still a minor. *Fleisher*, 829 F.2d at 1493. At the time of the sexual relationship with Fleisher, the woman was fifteen years old and Fleisher was nineteen. *Fleisher*, 829 F.2d at 1492-93. Both were members of a Boy Scouts of America Explorer post sponsored by the police department. *Fleisher*, 829 F.2d at 1492. Following an investigation of Fleisher's conduct, he was terminated. *Fleisher*, 829 F.2d at 1493. As reasons for the firing, the police chief cited three previous reprimands for misconduct during Fleisher's probationary period and his previous sexual conduct with a minor. *Fleisher*, 829 F.2d at 1493. Fleisher appealed the termination, complaining the police department had, among other things, violated his right of privacy. *Fleisher*, 829 F.2d at 1493.

Focusing on Fleisher's right of privacy claim, the court noted that while the Supreme Court has not defined the outer limits of the right of privacy, it has extended the right to cases involving personal decisions about marriage, procreation, contraception, family relationships, child rearing and education, and abortion. *Fleisher*, 829 F.2d at 1497 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977)). The court then focused its attention on the line of Supreme Court cases based on individual autonomy where

the right of privacy has been extended to unmarried individuals. *Fleisher*, 829 F.2d at 1497 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). While focusing on the extent of the right of privacy, the court also noted that the Supreme Court has expressly stated that the federal right of privacy does not protect all private sexual conduct. *Fleisher*, 829 F.2d at 1497 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (failing to find a general right of sexual privacy regarding homosexual conduct in a case questioning the constitutionality of a Georgia statute outlawing heterosexual and homosexual sodomy)).[7]

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[7] Most of the federal cases involving the federal right of privacy with facts similar to the case currently before us were decided prior to *Bowers v. Hardwick*. The results of those cases are mixed. *See Wilson v. Taylor*, 733 F. 2d 1539, 1544 (11th Cir. 1984) (holding that a police officer's dating a daughter of an organized crime figure was protected by the First Amendment's freedom of association clause); *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585, 590 (W.D. Mich. 1983) (holding that the discharge of a police officer because he was cohabitating with a woman to whom he was not married violated the officer's right of privacy), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985); *Swope v. Bratton*, 541 F. Supp. 99, 108 (W.D. Ark. 1982) (recognizing that a police officer's private off-duty sexual activities are within the zone of privacy and are protected from unwarranted governmental intrusion); *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979) (holding that regulations permitting inquiry into off-duty relationships of police officers exceeded the scope of

In analyzing the extent of the federal right of privacy. the *Fleisher* court focused on four factors: (i) the legality/illegality of the conduct; (ii) when the conduct occurred; (iii) the effect on the police department's community reputation and internal morale; and (iv) whether the conduct was clearly listed in the department's regulations as grounds for punishment. *Fleisher*, 829 F.2d at 1498-99. Considering these factors, the court first stated that the illegality of Fleisher's behavior created a substantial barrier to his successful assertion of a privacy claim. *Fleisher*, 829 F.2d at 1498. Second, the court noted that even though the conduct took place before Fleisher was employed by the

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the state's legitimate interests and violated the officer's constitutional right of privacy). *But see Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir.) (holding that an officer's right to privacy was not infringed by a regulation prohibiting cohabitation of two police officers or proscribing superior officer from cohabitating with officer of lower rank), *cert. denied*, 464 U.S. 965 (1983); *Suddarth v. Slane*, 539 F. Supp. 612, 618 (W.D. Va. 1982) (holding that a state trooper's adulterous relationship is protected neither by the First nor Fourteenth Amendments, especially when the Commonwealth of Virginia has a law which prohibits adultery); *Wilson v. Swing*, 463 F. Supp. 555, 562-64 (M.D. N.C. 1978) (holding that a police officer's adulterous relationship was not protected by the constitutional right of association or the analogous right of privacy). Reviewing these cases in our analysis of the Texas Constitution's right of privacy, we conclude the cases recognizing a right of sexual privacy present the stronger argument.

department, the department had an understandable concern that individuals hired to be guardians of the law should themselves have a history of compliance with the law. *Fleisher*, 829 F.2d at 1499. Third, the court believed that hiring an officer who had committed statutory rape with a member of the department's Explorer post would damage the reputation of the Explorer program and the department itself. *Fleisher*, 829 F.2d at 1499. The court also believed that retaining Fleisher would adversely affect the morale of other officers. Fourth, the court noted that Fleisher's conduct was clearly listed in the department's regulations as grounds for termination. *Fleisher*, 829 F.2d at 1499. Consequently, the court concluded that Fleisher's conduct was not protected by the federal right of privacy. *Fleisher*, 829 F.2d at 1499.

Applying the *Fleisher* factors to our case, we first note that appellee's conduct, unlike Officer Fleisher's, was legal. Second, there are no allegations that Olson and appellee ever engaged in sexual activity while on duty. Third, and of particular importance, we note all the witnesses with personal knowledge of the police department testified that the department's morale and discipline had not suffered in the three months after the relationship became common knowledge. Fourth, glaringly absent in this case are any written regulations or guidelines prohibiting the complained-of conduct.

Several states have also addressed the extent of the right of privacy in cases involving police officers' private sexual conduct. The Pennsylvania Supreme Court addressed this issue in *Fabio v. Civil Serv. Comm'n*, 414 A.2d 82 (Pa.

1980).[8] Officer Fabio and his wife were having marital difficulties. Officer Fabio believed that these difficulties could be overcome if his wife would engage in a sexual relationship with another officer on the police force. Meanwhile, Officer Fabio started an affair with his wife's

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[8] Several state courts have also addressed the issue of the right of sexual privacy more generally. *See Iowa v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976) (holding sodomy statute unconstitutional as an invasion of fundamental rights, such as the personal right of privacy); *Kentucky v. Wasson*, 842 S.W.2d 487, 496 (Ky. 1992) (holding that "immorality in private which does 'not operate to the detriment of others,' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution"); *New Jersey v. Saunders*, 381 A.2d 333, 339-41 (N.J. 1977) (holding that a state law prohibiting fornication impinges upon the rights of privacy provided by the state and federal constitutions); *New York v. Onofre*, 415 N.E.2d 936. 940-41 (N.Y. 1980) (holding that the right of privacy extends to people who engage in "deviant" sexual conduct "so long as the decisions are voluntarily made by adults in a noncommercial, private setting"), *cert. denied*, 451 U.S. 987 (1981); *Pennsylvania v. Bonadio*, 415 A.2d 47, 50-51 (Pa. 1980) (holding that the state and federal constitutions protect the right of consenting adults to engage in private sexual conduct).

eighteen-year-old sister. *Fabio*, 414 A.2d at 84. Based on this conduct, the Philadelphia Civil Service Commission recommended that the police department dismiss Officer Fabio. *Fabio*, 414 A.2d at 84. Officer Fabio challenged his dismissal asserting, among other things, that his conduct was protected by the right of privacy. *Fabio*, 414 A.2d at 87. In addressing the right of privacy, the court concluded that individuals in Pennsylvania have the right to engage in extramarital sexual activities free from governmental interference. *Fabio*, 414 A.2d at 89. In its analysis, the court relied heavily on the fact that the legislature had abolished the crime of adultery. *Fabio*, 414 A.2d at 89. After recognizing that the right of privacy had been implicated, the Pennsylvania court then concluded that the civil service commission had shown a compelling state interest that outweighed Officer Fabio's right of privacy. *Fabio*, 414 A.2d at 87. Similarly, because we hold that the Texas right of privacy has been implicated, we must now determine whether the City met its burden on summary judgment to show a compelling governmental interest.

C. The City's Governmental Interest

The right of privacy, like other constitutional freedoms, is presumptive and is not absolute. In particular cases, it may give way to overriding governmental interests. *TSEU*, 746 S.W.2d at 205. The right of privacy does not imply that the state is wholly disabled from promoting the majority's views of morality. However, there are limits on our government's ability to invade the most private aspects of its citizens' lives. Consequently, once the privacy right is implicated, the burden shifts and the government must show (i) its action is necessary to achieve a compelling governmental interest and (ii) that interest can be achieved by no less intrusive, more reasonable means. *TSEU*, 746

S.W.2d at 205.

A city may have interests as an employer in regulating the conduct of its employees that differ significantly from those it possesses in connection with its regulation of the public generally. *TSEU*, 746 S.W.2d at 205. In particular, Texas courts have shown deference to the important interests served by public agencies that are directly involved in the compelling state goal of protecting the safety of the general public. *See Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex. Civ. App.–Houston [14th Dist.] 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex. 1974). Despite this deference, the trial court here held that as a matter of law the City's objectives were not compelling. Such determinations as to the nature of the City's objectives and the reasonableness of the means used to achieve them are properly made in the trial court. *TSEU*, 746 S.W.2d at 206.

Even granting special deference to the policy choices of the police department, we must reject the City's asserted justifications because its goals could be achieved by less intrusive, more reasonable means. The City argued that its actions were justified as efforts to (i) maintain the respect and trust of other officers for their sergeants and (ii) protect the efficiency and morale of the department. Nevertheless, the City admits it had no written policies or guidelines pertaining to employees' off-duty sexual conduct. Without written guidelines and policies limiting the government's actions when those actions directly intrude on the core of a person's constitutionally protected privacy interests, the chances are too great that the government may act arbitrarily or capriciously. Such an unbounded, standardless inquiry, even if founded upon a legitimate governmental interest, cannot withstand the heightened scrutiny with which

we must view the City's actions. The legitimate regulation of employee fitness and competence cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

The danger presented by such standardless inquiries is readily apparent from the record presented to the Commission When asked at the Commission hearing whether Pollard would be promoted to lieutenant if he were to have an affair with a fellow officer's wife, the police chief stated that he could not make that determination because he must consider each situation on a case-by-case basis. However, in appellee's case, the police chief stated that this relationship "completely blind[ed] [him] to any other aspects of [appellee's] police career." From his testimony, it appears the police chief would be willing to consider mitigating factors such as objective qualifications in Pollard's case, but he is unwilling to consider such factors in appellee's case. Further, the police chief expressed no concern about a possible promotion for Pollard, even though Pollard willfully violated the police department's nepotism policy. Nor is there any evidence indicating that either Olson or Pollard was reprimanded for violating the department's nepotism policy. In comparison, appellee at most violated an unwritten, standardless policy grounded solely in the police chief's personal moral standards.

If the City chooses to regulate its employees' sexual morality, it must at least do so through regulations carefully tailored to meet the City's specified needs. Without narrowly tailored regulations, the risk is too great that an infringement of this important constitutionally protected right might be justified on the basis of individual prejudice and bias toward the protected conduct. It is important to note that private prejudice is never a cognizable

governmental interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). In fact, the very purpose of constitutional protection of individual liberties is to prevent capricious coercion by the majority.

Furthermore, we conclude the City failed to establish that appellee's actions had a significant effect on the police department. The City's evidence of its compelling governmental interest was limited to (i) a single note posted on a bulletin board, (ii) testimony that some officers had discussed the situation while on duty, and (iii) conclusory statements by the Chief and other supervisors that appellee could never gain respect from subordinates. We conclude, on the basis of the undisputed facts, the City's alleged harm is not sufficiently compelling to warrant its invasion of appellee's privacy. Moreover, we find it significant that the City did not offer any evidence regarding individual rank-and-file police officers' ability to work for appellee. Nor did it offer any evidence indicating that morale or discipline had actually been adversely affected after the relationship became common knowledge in the department. In fact, the City's own witnesses testified that morale and discipline in the department had remained unchanged since the disclosure.

The City failed to show that appellee's constitutionally protected, private, off-duty, personal activities had affected his on-the-job performance or the department's morale. Nor has the City shown that it had any specific regulations related to the complained-of conduct. Consequently, we hold the City's reliance on these private, non-job-related considerations in passing over appellee for promotion violated appellee's protected constitutional right of privacy. Accordingly, the City's failure to promote appellee cannot be upheld. Because the summary judgment

evidence failed to establish that the City's policy was narrowly tailored and the City's justifications were sufficiently compelling, we need not determine whether the City is prohibited from ever questioning or considering the sexual morality of its employees.

Because we hold that the Texas Constitution protects the complained-of conduct, we need not analyze the protection provided by the United States Constitution. We overrule the first and second points of error as they relate to the state constitutional claims.

2. Attorney's Fees

After the trial court granted appellee's motion for summary judgment on the constitutional question, the parties moved for summary judgment on the remaining issue of attorney's fees. In the third and fourth points of error, the City contends the trial court erred in (i) awarding attorney's fees to appellee and (ii) denying its attorney's fees.

Attorney's fees are not recoverable in an action unless provided for by statute or by contract between the parties. *First Nat'l Bank v. Anderson Ford-Lincoln-Mercury, Inc.*, 704 S.W.2d 83, 85 (Tex. App.–Dallas 1985, writ ref'd n.r.e.). The local government code provides for recovery of attorney's fees to the prevailing party in the appeal of a civil service-commission decision to the trial court. *TEX. LOCAL GOV'T CODE ANN.* § 143.015(c) (Vernon 1988). Because the City did not prevail in the trial court or in this Court, it is not entitled to recover its attorney's fees. Accordingly, we overrule the fourth point of error.

In the third point of error, the City argues (i) appellee did not segregate his attorney's fees attributed to

a claim appellee voluntarily nonsuited from the fees attributed to his successful claim in the trial court, and (ii) the time spent and rates charged are excessive. In his summary judgment proof, appellee produced three affidavits. One of these is an affidavit from appellee's attorney, Robert Richardson, attesting to his hourly rate and the time spent on the case. Richardson's affidavit concludes that the reasonable value of his services through trial is $59,609.37. The other two affidavits are from local attorneys attesting to the reasonableness of Richardson's fees. The first of these stated that a reasonable fee through trial would be $109,000. The second stated that a reasonable fee through trial would be between $68,125 and $102,187.50. The City produced summary judgment evidence indicating a reasonable attorney's fee through trial would be between $8,750 and $9,625. In its final judgment, the trial court awarded appellee $23,843.75 for his attorney's fees through trial.

An attorney's affidavit can sufficiently establish reasonable attorney's fees on a motion for summary judgment. *American 10-Minute Oil Change v. Metropolitan Nat'l Bank*, 783 S.W.2d 598, 602 (Tex. App.–Dallas 1989, no writ). However, the nonmovant may create a fact issue by filing an affidavit contesting the reasonableness of the movant's attorney's fees. *General Specialties, Inc. v. Charter Nat'l Bank*, 687 S.W.2d 772, 774 (Tex. App.–Houston [14th Dist.] 1985, no writ). Here, the City's affidavits challenged the reasonableness of Richardson's fees. The City raised fact issues regarding (i) the reasonableness of Richardson's hourly rate and (ii) the segregation of hours attributable to the claim for which recovery of attorney's fees was authorized. Because the City raised issues of material fact, summary judgment was improper. Accordingly, we sustain the City's third point of error.

We affirm the trial court's judgment as it relates to the state constitutional issue. We reverse the trial court's judgment as it relates to attorney's tees and remand for a trial on the issue of attorney's fees.

s/Linda Thomas
LINDA THOMAS
CHIEF JUSTICE

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APPENDIX B--JUDGMENT OF THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS, DATED AUGUST 28, 1995

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF SHERMAN, Appellant	Appeal from the 336th District Court of Grayson County, Texas (Tr.Ct.No.92-0720).
No. 05-94-00055-CV	V.
OTIS HENRY, Appellee	Opinion delivered by Chief Justice Thomas, Justices Maloney and Chapman participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED IN PART** and **REVERSED IN PART.** We **REVERSE** the trial court's judgment as it relates to attorney's fees and **REMAND** the issue of attorney's fees to the trial court for further proceedings consistent with this Court's opinion. In all other respects, we **AFFIRM** the trial court's judgment. It is **ORDERED** that appellee Otis Henry recover his costs of this appeal from appellant the City of Sherman.

Judgment entered August 28, 1995.

/s Linda Thomas
LINDA THOMAS
CHIEF JUSTICE

APPENDIX C--JUDGMENT (INCLUDING MEMORANDUM OPINION) OF THE 336TH JUDICIAL DISTRICT COURT OF GRAYSON COUNTY, TEXAS, DATED DECEMBER 2, 1993

NO. 92-0720

OTIS HENRY	)	IN THE 336TH JUDICIAL
VS.	)	DISTRICT COURT OF
CITY OF SHERMAN	)	GRAYSON COUNTY, TEXAS

FINAL JUDGMENT

On October 23, 1992, this matter came on for hearing, both Plaintiff and Defendant having filed their respective motions seeking summary judgment. The Court, by Memorandum Opinion dated March 4, 1993, found for the Plaintiff, and on March 25, 1993, signed an Order Granting Summary Judgment to Plaintiff; Denying Defendant's Motion for Summary Judgment; and Ordering Further Proceedings, directing that the March 25, 1993, Order remain interlocutory until such time as the Court held an additional hearing and made a determination upon the issues of attorney fees and back pay for Plaintiff. On November 5, 1993, hearing was held on the remaining issues, Plaintiff having filed Plaintiff's Motion for Summary Judgment on Remaining Issues, and Defendant having filed Defendant's Response to Plaintiff's Motion for Summary Judgment on Remaining Issues, Request for Reconsideration of Earlier Order, and Defendant's Motion for Summary Judgment on Attorney's Fees. The Court,

having now considered all pleadings, motions and briefs of counsel, together with the record of the proceedings below; having independently researched the law and written and filed a Memorandum Opinion dated March 4, 1993; and having considered all affidavits with regard to attorneys' fees (the issue of back pay for Plaintiff being a matter of stipulation), the Court enters the following Final Judgment:

ORDER REVERSING DECISION OF CIVIL SERVICE COMMISSION; DIRECTING THAT PLAINTIFF BE PROMOTED TO THE RANK OF SERGEANT EFFECTIVE FEBRUARY 14, 1992; AND AWARDING BACK PAY

MEMORANDUM OPINION

This case was presented to the Court by way of oral stipulations, arguments, and written briefs where virtually all of the facts were undisputed. Plaintiff, Otis Henry, a Sherman, Texas, police patrolman comes to this Court with his appeal of the decision of the Civil Service Commission of Defendant, City of Sherman, Texas, wherein the Commission upheld the decision of the Chief of Police to deny Plaintiff promotion to the rank of sergeant. A review of the record reflects that Plaintiff was, by far, the best qualified candidate for promotion to the sergeant's position. His test score of 84 exceeded the next highest candidate's score by eight full points. He had completed all Texas Commission on Law Enforcement standard certification procedures; has associate's and bachelor's degrees in criminal justice; had numerous commendations; and had, in fact, been selected as "Outstanding Officer of the Year" in 1991. The police chief admitted that Plaintiff's qualifications rivaled his own and that Plaintiff had left nothing necessary to qualify himself for promotion unaccomplished. So, what

happened to side rail Officer Henry's promotion? The record reflects that the chief of police chose to ignore these qualifications because Officer Henry had immoral carnal communications, also known as sexual relations, with the wife of a fellow officer and that such conduct had blinded him to any other aspect of Plaintiff's police career.

Both Plaintiff and the lady in question freely admitted that they had indulged in private, consensual sexual relations. She admitted that at the outset she had misrepresented her marital status to Plaintiff by telling him that she was at that time not actually married. In fact, she and her husband kept their marriage secret for many months. All parties agreed that the sexual relationship never took place during duty hours. Indeed, the police chief never launched a formal investigation, choosing simply to direct a police lieutenant to conduct an "informal investigation" as "rumors persisted." The record further reflects that no disciplinary action was taken against Plaintiff, not even a written reprimand in his personal file.

Both attorneys have stipulated that the sole reason for the decision of the chief of police not to promote Patrolman Henry was because of his adulterous affair with another officer's wife. Plaintiff was simply passed over for promotion because such promotion would "adversely impact the morale and efficiency of the police department," according to the chief's memorandum of February 14, 1992, purporting to give cause for the passover.

THE QUESTION

Can the conduct of a citizen
which is not violative of any

federal, state, or local criminal law and done while away from work and on his own time be punished by his employer, a division of local government, because it violates the moral code of such employer? More basically, can conduct, protected by the rights of privacy guaranteed by the federal and state constitutions, nevertheless constitute the "substantial evidence" necessary to uphold a government entity's decision to deny employment rights to a public employee? In this connection, is adultery a right protected by the United States Constitution and/or the constitution of the State of Texas? Can such conduct, even if it is protected by the constitution, nevertheless be the basis of disciplinary action or a reason not to promote an employee if it can be shown that such conduct would adversely impact the morale and efficiency of the department?

THE LAW

TEX. LOC. GOV'T CODE

> ANN. §143.036 (Vernon 1988; 1993 Vernon Supp.) gives a police chief the discretion to pass over the top person on an eligibility list only if there is a valid reason for such passover. The discretion is, however, limited. A "reason" which runs afoul of the constitution can never be a "valid" reason. The sole reason Plaintiff was passed over was his sexual promiscuity. Such promiscuity, however, was conducted in private and during off-duty hours.

The protection of the individual's right to privacy is inherent in the United States Constitution, and it is no longer subject to question that an individual's private sexual activities are within the "zone of privacy," which is protected from government intrusion. *Roe v. Wade*, 410 U.S. 113 (1973). The appellate courts of Texas have recognized and broadened this protected right of privacy. *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746 S.W.2d 203 (Tex. 1987).

At this point, I must confess that Plaintiff's actions in committing adultery with a fellow officer's wife is repugnant to my own sense of morality and order. This Court has strong personal opinions regarding private morality, particularly when it comes to the wife of a colleague. As an individual, this Court cannot and does not condone sexual promiscuity. However, in deciding this case, I am constrained to set aside personal opinions and preferences

and instead look to the constitutions and laws of our state and nation. History teaches us that the only thing standing between the rights of the private citizen and the all-powerful government is the court system. In that capacity, my oath of office dictates that this court must stand tall.

Counsel for defense asks a very interesting question: Does the constitution protect adulterous conduct? Although adultery is not violative of any federal or state penal statute, it is actionable in civil court. But as Plaintiff has so correctly pointed out in his brief, moral standards concerning sexuality have changed over the generations and are continuing to change at this time. What was immoral to our grandparents may be perfectly acceptable conduct today, and our laws reflect these attitudes.[9] But the question

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[9] In studying this case, this court cannot help but remember the true story of a young girl from Nocona, Texas, during the 1920's. Her older brother had some male friends over one Sunday afternoon and, as children will do, they began to "horse around." One thing lead to another and at some point the young girl danced with several of her brother's friends. Word got out and, by the middle of the next week, the young girl was called to the superintendent's office at the public school where she attended. After informing her how disgraceful her conduct had been, she was **expelled** from **public school** for having danced on Sunday. Her father, a poor and struggling cobbler, allowed the young girl to work making boots in his shop. Apparently very talented and adept at bootmaking, her reputation grew over the years. The young girl who was expelled from her public school for having danced on Sunday became the matriarch of the Nocona Boot empire,

remains: Does the constitution protect adulterous conduct? The answer is, if this conduct is private and consensual and committed on the perpetrator's [illegible] time and away from the office, it is within the "zone of privacy" and is, of course, protected.

Defendant argues that regardless of constitutional protection, the promotion of Plaintiff under the circumstances would adversely affect department morale. The argument, under the facts of this case, cannot stand. The chief of police obviously concluded that, Plaintiff's conduct being private, the chief had no legal power to suspend Plaintiff, formally reprimand Plaintiff, or otherwise sanction Plaintiff. The record is clear that Plaintiff at all times material to this lawsuit has gone about his day-to-day performance of his regular duties at the Sherman police department. Any adverse effect on departmental morale would have already occurred as a result of the chief's failure to impose sanctions upon Plaintiff.

In any event, this court believes that since no Texas cases are directly on point, the rulings in *Briggs v. North Muskegon Police Department*, 563 F.Supp. 585 (W.D. Mich. 1983), affirmed (unpublished opinion) 746 F.2d 1475 (6th Cir. 1984), and *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) cert. denied 469 U.S. 979 (1984), offer the most sensible approach in this situation and are controlling. In *Thorne*, as you are aware, Plaintiff was denied employment at the El Segundo police department even

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the largest employer in Nocona, Texas. For once, religious fanaticism and blind intolerance actually led to personal success ... and now you know the rest of the story.

though she had made top grades on all written, oral, and physical exams, because she confessed to having had an extramarital affair with a married El Segundo police officer. The United States Court of Appeals for the Ninth Circuit reversed a lower court decision which had allowed the conduct of the City of El Segundo, and in doing so affirmed the notion that "The risk that an infringement of an important constitutionally protected right might be justified on the basis of individual bias and disapproval of the protected conduct is too great. The very purpose of constitutional protection of individual liberties is to prevent such majoritarian or capricious coercion." (at 470) The *Thorne* case represents a close fact situation to the controversy which is the basis of this suit.

But, Defendant may reasonably inquire, can constitutionally protected conduct never be subject to inquiry, even when it affects the department? In other words, can an employee do anything he/she desires on their own time and expect no repercussions, even when such conduct has a negative or even disastrous effect on the department? Certainly not. The *Briggs* case, I think, presents the most sensible approach to the problem. That court held that "there are areas of a police officer's private life and sexual behavior which are simply beyond the scope of any reasonable investigation ... In the absence of a showing that a policeman's private, off-duty personal activities have an impact on his job performance, we believe that the inquiry into those activities violates the constitutionally protected right of privacy." 470 F.Supp. 449, 459.

Again, stipulated evidence assures us that the sole reason that passing over Plaintiff for promotion was his

extramarital affair, and no evidence indicates that it in any way affected his job performance. Under these facts, as applied to present law, as reprehensible and disgusting as Officer Henry's conduct may have been to the chief of police, the Civil Service Commission, and this Court, his failure to be promoted was erroneous.

ORDERS PURSUANT TO MEMORANDUM OPINION

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Otis Henry, be promoted to the rank of Sergeant, with such promotion becoming effective on February 14, 1992, the date Plaintiff was passed over for promotion.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Plaintiff be and is hereby awarded back pay in the amount of $1,642.76 for pay periods through November 30, 1993. In the event that this Final Judgment does not become final by reason of any appeal, until a date subsequent to November 30, 1993, and Plaintiff is not promoted to the rank of Sergeant until a date after November 30, 1993, then Plaintiff shall recover lost wages at the rate of $111.00 per month, together with all regular pay raises that would have accrued had he been promoted in accordance with this Final Judgment, said sum of $111.00 per month to accrue each month from November 30, 1993, until this Final Judgment becomes final and Plaintiff is promoted to the rank of Sergeant.

ORDER AWARDING ATTORNEY FEES

The Court, having considered Plaintiff's Motion for Summary Judgment on Remaining Issues, together with the

Affidavits attached thereto; having considered Defendant's Response to Plaintiff's Motion for Summary Judgment on Remaining Issues, Request for Reconsideration of Earlier Order, and Defendant's Motion for Summary Judgment on Attorney's Fees, together with the Affidavits attached thereto; and having taken judicial notice of the usual and customary attorney's fees and of the contents of the case file, this being a proceeding before the Court, and the Court being entitled to take judicial notice pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1986), the Court enters the following order:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Otis Henry, have and recover from Defendant, City of Sherman, attorney's fees in the total sum of $36,343.75 to be taxed as costs; and it is the further judgment of the Court that if the Defendant herein does not appeal this cause, this Judgment shall be credited with the sum of $12,500.00, leaving recovery for attorney's fees herein in the sum of $23,843.75. It is the further order of the Court that in the event this cause is appealed to the Court of Appeals, but said cause is not carried to the Supreme Court of Texas, that this Judgment be credited with the sum of $5,000.00, leaving recovery for attorney's fees in the sum of $31,343.75.

ORDER AWARDING PRE-JUDGMENT INTEREST

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pre-judgment interest at the rate of 10% per annum shall accrue on the back pay awarded to Plaintiff for the period of time commencing on the 180th day after the date suit was filed and ending on the day preceding the date of this Judgment, all pursuant to TEX. REV. CIV.

STAT. ANN. art. 5069-1.05 § 6(a) (Vernon 1993 Supp.).

ORDER AWARDING POST-JUDGMENT INTEREST

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the entirety of this Judgment, the amounts awarded for back pay, pre-judgment interest, attorney's fees and court costs, shall earn interest, compounded annually, at the rate of 10% per annum, or for purposes of future calculation, at the rate provided pursuant to TEX. REV. CIV. STAT. ANN. art. 5069-1.05 § 2 (Vernon 1993 Supp.).

ORDER AWARDING COURT COSTS

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover from Defendant all costs of court herein.

RELIEF NOT GRANTED, DENIED

It is further ORDERED that all relief prayed for by either of the parties to this case, which is not specifically granted herein, is denied.

SIGNED, RENDERED and ENTERED, this 2nd day of December, 1993.

/Ray F. Grisham
RAY F. GRISHAM
JUDGE PRESIDING